

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911

No. 92

LAWRENCE E. SEXTON, AS TRUSTEE IN BANKRUPTCY
OF ALFRED KESSLER; RUDOLF E. F. FLINSCH AND
WILLIAM K. GILLETTE, COMPOSING THE FIRM OF
KESSLER & COMPANY, AND OF THE SAID KESSLER
& COMPANY, APPELLANT,

vs.

KESSLER & COMPANY, LIMITED, AND FRANK YOUATT,
LIQUIDATOR.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

FILED JULY 16, 1909.

(21,756.) +

(21,756.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 530.

LAWRENCE E. SEXTON, AS TRUSTEE IN BANKRUPTCY
OF ALFRED KESSLER; RUDOLF E. F. FLINSCH AND
WILLIAM K. GILLETTE, COMPOSING THE FIRM OF
KESSLER & COMPANY, AND OF THE SAID KESSLER
& COMPANY, APPELLANT,

v.s.

KESSLER & COMPANY, LIMITED, AND FRANK YOUATT,
LIQUIDATOR.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

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United States Circuit Court of Appeals for the Second Circuit.

LAWRENCE E. SEXTON, as Trustee, etc., Complainant-Appellee,

vs.

KESSLER & COMPANY, LTD.; FRANK YOUATT, Liquidator, Defendants-Appellants,

and

J. & P. COATS, LTD., Intervenor, Defendant-Appellee.

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United States for the Southern
District of New York.

Printed under the direction of the clerk.

(a)



United States District Court, 1

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. } Order.
F. FLINSCH and WILLIAM K.
GILLETT, composing the firm
of Kessler & Company,
Bankrupts.

2

Upon reading and filing the annexed petition of Frederick C. McLaughlin verified the 22d day of November, 1907, and upon all the papers and proceedings had herein it is

Ordered that Laurence E. Sexton, Esq., the Receiver in bankruptcy herein, or his attorney, be and he hereby is directed to show cause before this Court at a term thereof to be held for the hearing 3
of motions on the 25th day of November, 1907, at 10.30 o'clock in the forenoon or as soon thereafter as counsel can be heard why an order should not be made herein referring the claim of the estate of the above named bankrupts which is set forth in the Order appointing the Receiver herein and in the affidavit of John Larkin, Esq., thereto annexed, to a United States Special Commissioner to

- 4 hear and determine the same forthwith upon the merits and directing the said Receiver to prosecute said claim as speedily as possible before said United States Special Commissioner, and for such other and further relief as may be just and proper, and it is

Further ordered that service of this Order to show cause by delivering a copy thereof to the Receiver in bankruptcy herein or to his attorney on or before the 23d day of November, 1907, shall be sufficient.

GEO. B. ADAMS,
D. J.

- 5 Dated N. Y., Nov. 23, 1907.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E.
F. FLINSCH and WILLIAM K.
GILLETT, composing the firm
of Kessler & Company,
Bankrupts.

} Petition.

6

TO THE HONORABLE JUDGES OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK :

The petition of Frederick C. McLaughlin on information and belief respectfully shows as follows :
that your petitioner is a member of the firm of McLaughlin, Russell, Coe & Sprague, who are attorneys for Kessler & Company, Limited, of Man-

chester, England, a corporation duly organized and existing under the laws of Great Britain, having its principal place of business at Manchester, England; that on or about the 18th day of November, 1907, Frank Youatt, Esq., of Manchester, England, was duly appointed a liquidator for the share holders of said corporation and has duly qualified and is now acting as such liquidator; that thereupon your petitioner's firm was duly retained by said liquidator as his attorneys under authority of the Court which appointed him. 7

That on the 8th day of November, 1907, when the petition in bankruptcy herein was filed and the order entered appointing the Receiver herein, the said firm of Kessler & Company, Limited, of Manchester, England, was in possession of certain securities, a list of which is set forth in the testimony taken herein of Henry Kessler, Esq., upon his examination before a Special Commissioner by the Receiver herein, under the following circumstances: On the 30th day of June, 1903, Kessler & Company of New York, bankrupts above named, wrote to Kessler & Company, Limited, of Manchester, England, as follows: 8

"DEAR SIRS:

In accordance with instructions from Mr. Alfred Kessler we have today placed in a separate package in our Safe Deposit Vaults the following securities, package marked 'Escrow for account of Kessler & Company, Limited, of Manchester': 9

1484 Shares Oklahoma Gas & Electric Co. @ 25.....	\$ 37100.
2428 Shares United Lighting & Heating Co. @ 12.....	29136.
2352 Shares Daimler Mfg. Co. @ 50	117600.
37300 Shares United Breweries	
First 6s @ 65.....	242245.

Total\$426081.

10

This escrow is intended as a protection against our long drawings against your good selves.

Kindly confirm if in order, and oblige.

Yours very truly,"

That on July 8th, 1903, Kessler & Company, Limited, of Manchester, England, wrote to Kessler and Company of New York, bankrupts above named, the following letter in reply :

"DEAR SIRS :

11

We are in receipt of your favor of 30th ult. in which you advise us of the securities you have laid aside for security for your long drawings on us. We have noted the particulars as given up to us and the matter does in order. If at any time you have an opportunity of realizing these securities or any part of them, you are at liberty to take them and replace them by others of equal value, though in that case we should, of course, like to see rather better quality. We have also your letter of same date.

We are dear Sirs,

Yours very truly,"

12

That at the time of this correspondence Kessler & Company of New York were given a constant credit by Kessler & Company, Limited, of Manchester, England, to the amount of £80,000, which was exercised by sixty and ninety day drafts drawn from time to time by Kessler & Company of New York on Kessler & Company, Limited, of Manchester, and discounted by Kessler & Company of New York upon the acceptances by Kessler & Company of Manchester; that from time to time the securities contained in the said escrow were changed by Kessler & Company of New York, always upon notification to Kessler & Company of

Manchester, and such securities as were thus re- 13
 moved from the escrow either because they ma-
 tured or because they were salable at a favorable
 price, were always replaced by securities of equal
 value and of a good character, so that the escrow
 established on June 30th, 1903, remained intact
 and of substantially the same value down to the
 date of the filing of the petition in bankruptcy
 herein; that on the first of January, 1904, Kessler
 & Company of New York wrote to Kessler & Com-
 pany of Manchester as follows:

"DEAR SIRS:

We certify that we have specially set 14
 aside and hold for your account on this the
 31st day of December, 1903, as security for
 the drawing credit which you accord us the
 following securities:" (Here follows the
 list of securities carried out at a market
 price at a total value of \$421,232.)

That on the 4th day of January, 1905, Kessler
 & Company of New York wrote to Kessler & Com-
 pany, Limited, of Manchester as follows:

"DEAR SIRS:

We certify that we have specially set 15
 aside and hold for your account on this, the
 31st of December, 1904, as security for
 the drawing credit which you accord us the
 following securities:" (Here follows a list
 of securities carried out at market price at
 a total value of \$561,595.85.)

That on August 24th, 1906, Kessler & Company
 of New York sent Kessler & Company, Limited, of
 Manchester, a similar list entitled "List of Kessler
 & Company, Limited, escrow," containing securi-
 ties carried out at the market price to the value of
 \$539,010. That all of the rest of the correspond-

16 ence relating to this escrow as shown on the books
 of Kessler & Company of New York relate merely
 to substitutions necessary for the preservation of
 said escrow, made from time to time by Kessler &
 Company of New York, of certain portions of the
 said escrow and of which substitutions Kessler &
 Company of Manchester were immediately notified
 when made. That on the 25th day of October,
 1907, the said escrow contained securities carried
 at market value stated in a list on that day furn-
 17 ished by Kessler & Company of New York of the
 total amount of \$512,047.41 and containing a por-
 tion of the securities originally deposited on June
 30th, 1903. That on August 27th, 1907, a special
 escrow against long drawings to the amount of
 £20,000 was established by the following letter
 from Kessler & Company of New York to Kessler
 & Company of Manchester:

“We cabled you to-day we had drawn £20,-
 000 60 d/s on your good selves and have
 placed in a separate cover against this the
 following:” (Here follows a list of securi-
 ties carried at market value in the total
 value of \$107,275.)

18 On September 4th, 1907, Kessler & Company of
 Manchester replied as follows:

“We also take note of the securities which
 you have lodged in a new separate escrow
 against your special drawing of £20,000
 about which you called and which you ad-
 vised in your ordinary correspondence re-
 ceived to-day. We anticipate that this spec-
 ial drawing will not be renewed and that
 your drafts on us generally will presently
 come to a more moderate level.

Yours very truly,”

That Kessler & Company, Limited, of Manchester, England, not only accepted the said draft of £20,000 referred to in said letter of August 27th, 1907, but thereafter and subsequent to said date and as late as October 24th, 1907, accepted drafts in various other amounts by Kessler & Company of New York, secured by the said original escrow established on June 30th, 1903, the total amount of said acceptance being £80,289-15-7; that on the 25th day of October, 1907, the securities contained in both of said escrows were taken from the Safe Deposit box of Kessler & Company of New York and delivered to Henry Kessler, Esq., Chairman of the Board of Directors and Managing Director of Kessler & Company, Limited, of Manchester, England, under circumstances fully set forth in the testimony of said Henry Kessler, Esq., taken in this proceeding, which is here referred to and made part of this petition; that at the time said Henry Kessler took possession of the said escrow he had not reasonable cause to believe and did not believe either that a preference was intended or that Kessler & Company of New York were insolvent.

That by an Order appointing the Receiver herein dated November 8th, 1907, Kessler & Company, Limited, of Manchester, England, and Henry Kessler, Esq., are enjoined, restrained and stayed from removing from the place where it now is or from the City or State of New York or from transferring or otherwise interfering with any stocks, bonds or other securities or any other property of any nature whatsoever which now is or belongs, or at any time during the four months immediately preceding the date of this Order was or belonged to is or at said time or times was in the custody, possession or control of the said alleged bankrupts or any thereof; that an injunction has likewise been obtained in this proceeding and served

22 upon the Hanover Safe Deposit Company, where the said securities are now lodged.

That drafts of Kessler & Company of New York, accepted by Kessler & Company, Limited, of Manchester to the amount of £30,000 became due and were presented for payment on November 7th and November 11th, 1907, and that other drafts to the amount of upwards of £50,000, drawn by Kessler & Company of New York and accepted by Kessler & Company of Manchester, England, will fall due at various dates between now and January 24th, 1908; that by reason of the injunction granted in this proceeding Kessler & Company of Manchester, England, have been wholly deprived of any rights which they may have as pledgee or otherwise to avail themselves of the security deposited with them as aforesaid as a protection to them as against their acceptances of the long drawings of Kessler & Company of New York and have been obliged in consequence of said injunction to suspend payment and to make a voluntary liquidation as hereinabove stated; that said house of Kessler & Company, Limited, of Manchester, England, has been engaged in business as merchants for an uninterrupted period of over one hundred years and until recently has been doing a business of about Five Million Dollars a year with customers throughout the world; that irreparable damage and loss to the said firm of Kessler & Company, Limited, has already been suffered by said firm by reason of its having been deprived of its securities as aforesaid and, unless immediate relief can be granted by a trial upon the merits forthwith of the alleged right, title and interest of the claim in these securities by the Receiver in bankruptcy herein and by the estate of the above-named bankrupts, the said firm of Kessler & Company, Limited, of Manches-

ter will be put into bankruptcy by its creditors 25
and its estate distributed and its business ruined.

That your petitioner in behalf of his clients
above named, hereby waives any right to a plenary
suit and submits to the jurisdiction of this Court
in order that this Court may forthwith appoint a
United States Special Commissioner herein to
hear and determine upon the merits the issues pre-
sented by the claim of the Receiver in bankruptcy
herein and respectfully asks this Court to refer
the matter to a United States Special Commis-
sioner and to direct the Receiver in bankruptcy
herein to proceed at once before such United States
Special Commissioner in the prosecution and 26
any claim which said estate may have against said
securities.

Wherefore your petitioner prays for an order di-
rected to Laurence E. Sexton, Esq., Receiver
herein, to show cause why an order should not be
made referring the claim of the estate of the above-
named bankrupts to a United States Special Com-
missioner to hear and determine the same upon the
merits and directing the said Receiver to proceed
before such Special Commissioner at once in the
prosecution of said claim and for such other and
further relief as may be just and proper.

FREDERICK C. McLAUGHLIN,

Petitioner. 27

UNITED STATES OF AMERICA, }
Southern District of New York, } ss. :

FREDERICK C. McLAUGHLIN, being duly sworn,
says that he is the petitioner named in the fore-
going petition, that he has read the same and
knows the contents thereof, and that the same is
true to his own knowledge except as to matters
therein stated to be alleged upon information and

28 belief and that as to those matters he believes it to be true.

FREDERICK C. McLAUGHLIN.

Sworn to before me this 23 }
day of November, 1907. }

THOS. ALEXANDER,
U. S. Com.

(Endorsed)—Order and Petition.—Filed Nov. 26,
'07.—Peter B. Olney, Master.

29

At a Term of the United States District Court for the Southern District of New York, held at the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 26th day of November, 1907.

Present—Honorable CHARLES M. HOUGH,
District Judge.

30

IN THE MATTER	}
OF	
ALFRED KESSLER, RUDOLF E. F.	
FLINSCH and WILLIAM K.	
GILLETT, composing the firm	}
of Kessler & Company,	
Bankrupts.	

A motion having regularly come on to be heard before this Court at a Stated Term thereof for the hearing of motions on the 25th day of November, 1907, upon the order to show cause herein dated the 23d day of November, 1907, and upon the petition of Frederick C. McLaughlin thereto annexed, verified the 23d day of November, 1907, and due

proof of service of said order to show cause having
 been made upon Lawrence E. Sexton, Esquire, 31
 Receiver in Bankruptcy herein, and upon the at-
 torney for the petitioning creditors herein, and
 after hearing Frederick C. McLaughlin, Esquire,
 in support of said motion, and Wallace Macfarlane,
 Esquire, one of the attorneys for the Receiver
 herein, and John Larkin, Esquire, attorney for the
 petitioning creditors herein appearing upon said
 motion, but not opposing the same, and due delibera-
 tion having been had, now, on motion of Mc-
 Laughlin, Russell, Coe & Sprague, Esquires, attor-
 neys for Kessler & Company, Limited, of Manches-
 ter, England, and Frank Youatt, Esquire, the pro- 32
 visional liquidator of Kessler & Company, Limited,
 of Manchester, England, it is

Ordered that the claim of the Receiver in Bank-
 ruptcy herein and of the estate of the bankrupts
 above named to the securities and property in the
 possession of Kessler & Company, Limited, of Man-
 chester, England, which claim is set forth in the
 affidavit of John Larkin, Esquire, verified the 7th
 day of November, 1907, upon which the order ap-
 pointing the Receiver herein was made and any and
 all other claims of the said bankrupt estate to the
 said property, be and the same hereby are referred
 to Honorable Peter B. Olney, Referee in Bank-
 ruptcy, as Special Master, to hear and determine 33
 the same upon the merits, and it is

Further Ordered that the Receiver in Bank-
 ruptcy be, and he hereby is directed to prosecute
 said claims as speedily as possible before said Spe-
 cial Master, and that the hearings proceed as far as
 practicable from day to day, in order that the
 right, title and interest, if any, of this bankrupt
 estate to the said property may be determined
 without delay.

C. M. HOUGH,

D. J.

(Endorsed)—Order.—Filed Nov. 26, '07.

34 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. F.
FLINSCH and WILLIAM K.
GILLET, composing the firm
of Kessler & Company,
Bankrupts.

35

LAWRENCE E. SEXTON, as Re-
ceiver in Bankruptcy of Al-
fred Kessler, Rudolf E. F.
Flinsch and William K. Gil-
lett, composing the firm of
Kessler & Company, and the
said Kessler & Company

Petition.

AGAINST

KESSLER & COMPANY, Limited.

36

TO THE HONORABLE THE JUDGES OF THE DISTRICT
COURT OF THE UNITED STATES FOR THE SOUTH-
ERN DISTRICT OF NEW YORK :

The petition of Lawrence E. Sexton, respectfully
shows

FIRST.—That he was duly appointed receiver of
the alleged bankrupts herein by an order made by
this court and filed herein on November 8th, 1907,
and that in pursuance of said order he has filed a
bond in the sum of one hundred thousand dollars,
as required by said order and the Statutes in such
case made and provided, and that said bond has

been duly approved, and that your petitioner is 37
now administering the said estate as such receiver.

SECOND.—That as your petitioner is informed and verily believes, on or about the 25th day of October, 1907, Kessler & Company, a copartnership composed of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, were the owners and in possession of the securities and property described in the Schedule hereto annexed, marked "A."

THIRD.—That as your petitioner is informed and verily believes, on said 25th day of October, 1907, 38
the said copartnership of Kessler & Company was insolvent.

FOURTH.—That as your petitioner is informed and verily believes, on said date the said Kessler & Company transferred to Kessler & Company, Limited, of Manchester, England, a corporation organized and existing under the laws of Great Britain, the securities set forth in said Schedule without present consideration therefor.

FIFTH.—That as your petitioner is informed and verily believes, on or about the 30th day of October, 1907, the said copartnership of Kessler & Company 39
made a general assignment for the benefit of creditors, under the laws of the State of New York, to William Williams, who thereupon entered into possession of the said assigned estate and proceeded to administer the same under the Statute in such case made and provided.

SIXTH.—That as your petitioner is informed and verily believes, on or about the 8th day of November, 1907, a petition was filed in this Court praying that the copartnership of Kessler & Company,

40 as well as the individual members thereof, be adjudged and declared to be bankrupts, and thereafter such proceedings were had, that on or about the 22nd day of November, 1907, the said copartnership of Kessler & Company and Alfred Kessler and Rudolf E. F. Flinsch were and each was declared and adjudged bankrupt.

SEVENTH.—That as your petitioner is informed and verily believes, the transfer of the securities aforesaid by the copartnership of Kessler & Company to Kessler & Company, Limited, was made when the former was insolvent, and was within
41 four months prior to the filing of said petition in bankruptcy, and the result of said transfer would enable Kessler & Company, Limited, a creditor of the bankrupt copartnership, to obtain a greater percentage of its debt than other creditors of the same class; and that the said Kessler & Company, Limited, or its agent acting therein, in receiving said transfer of securities, had reasonable cause to believe that it was intended to give a preference thereby.

EIGHTH.—That as your petitioner is informed and verily believes, the said transfer of securities
42 to said Kessler & Company, Limited, as above set forth, was made with the intent and purpose on the part of the said copartnership of Kessler & Company to hinder, delay and defraud their creditors or some of them, and was made without any present consideration therefor from Kessler & Company, Limited, which said Company was not a purchaser in good faith, and for a present fair consideration.

Wherefore your petitioner prays that it may be adjudged and determined that the transfer aforesaid be set aside and that the said securities and

property set forth in said schedule be held to be the 43
property of the bankrupt estate, and that the same
and all thereof be delivered up to your petitioner,
or to the trustee of the said estate when he shall
have been elected.

(Sd.) LAWRENCE E. SEXTON,
Petitioner.

WALLACE MACFARLANE,
Attorney for petitioner.

JOHN LARKIN,
Of counsel.

SOUTHERN DISTRICT OF NEW YORK, }
County of New York. } ss. : 44

I, LAWRENCE E. SEXTON, receiver of Kessler &
Company, bankrupts, do hereby make solemn oath
that the statements contained in the foregoing peti-
tion subscribed by me are true, except as to such
statements as are stated to be alleged on informa-
tion and belief, and as to such statements I believe
the said petition to be true.

(Sd.) LAWRENCE E. SEXTON.

Sworn to before me this }
30th day of Nov., 1907. }

G. M. HAYES,
[N.S.] Notary Public No. 201,
New York County. 45

SCHEDULE "A."

2428 Sh. United Lighting & Heating Co., Com-
mon.

1906 " United Lighting & Heating Co., Com-
mon.

1341 " Daimler Mfg. Co., Preferred.

\$56,000 United Breweries Co., 1st 6's.

\$50,000 " " " 6% notes.

1000 Sh. Underground Elec. London, shares full
paid.

- | | | |
|----|---------------------|--|
| 46 | 2000 Sh. | Underground Elec. London, Beneficial certificates. |
| | 70 " | Standard Roller Bearing Co., Common. |
| | 100 " | " " " " Pref'd. |
| | 10,000 " | Elkton Mining Co. |
| | 500 " | U. S. Red. & Ref. Co., Preferred. |
| | 1,000 " | " " " Common. |
| | \$45,000 | Pittsburg, Westmoreland & Somerset, 1st 5's. |
| | \$12,500 | Indiana, Columbus & Eastern, 1st 5's. |
| | 288 Sh. | Muskegee Gas & Electric Co., Common. |
| | 288 " | " " " " Pref'd. |
| | \$22,000 | " " " " Refg. 5's. |
| 47 | 1018, 1020 and 1022 | Bedford Avenue, Brooklyn. |
| | \$7,234.28 Pd. | Western Pacific Syndicate, Rect. |
| | 548 Sh. | Chicago Gt. Western Pfd., B. |
| | \$20,000 | Orleans County Quarry Co., 1'st 6's. |
| | \$16,000 | Note Milne Turnbull & Co., due Nov. 11. |
| | 7,000 | Note Milne Turnbull & Co., due Dec. 27. |
| | 17,000 | Note Milne Turnbull & Co., due Dec. 27. |
| | 5,000 | Note R. B. Niaclea & Co., due Dec. 5. |
| | 300 Sh. | Cripple Creek Central, Common. |
| 48 | 466 " | " " " " Preferred. |

(Endorsed)—Petition of Recr.—Filed Nov. 30, '07.

DISTRICT COURT OF THE UNITED STATES, 49

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. F.
FLINSCH and WILLIAM K.
GILLET, composing the firm
of Kessler & Company,
Bankrupts.

50

LAWRENCE E. SEXTON, as Re-
ceiver in Bankruptcy of Al-
fred Kessler, Rudolf E. F.
Flinsch and William K. Gil-
lett, composing the firm of
Kessler & Company, and the
said Kessler & Company

AGAINST

KESSLER & COMPANY, Limited.

Kessler & Company, Limited, of Manchester, 51
England, and Frank Youatt, Esquire, liquidator of
said Company, under the English Companies' Acts,
appear herein by their attorneys, McLaughlin,
Russell, Coe & Sprague, and answer the petition
herein as follows:

FIRST.—The said Kessler & Company, Limited,
of Manchester, England, and the said Frank
Youatt, Esquire, liquidator, appear herein as de-
fendants in this proceeding, and submit to the
jurisdiction of this Court the questions involved
herein and waive a plenary suit.

52 **SECOND.**—They allege that Kessler & Company, Limited, of Manchester, England, is a corporation duly organized and existing under the laws of the Kingdom of Great Britain and Ireland by virtue of the English Companies' Acts, having a principal place of business at Manchester, England, being organized and incorporated under said Acts in the month of July, 1902, and that, on information and belief, on the 18th day of November, 1907, the shareholders of the said Company passed a resolution for a voluntary winding up under said Companies' Acts, and appointing Frank Youatt, Esquire, as liquidator therefor.

53 **THIRD.**—They deny the allegations contained in paragraphs numbered "Second," "Third," "Fourth," "Seventh" and "Eighth" of said petition.

Wherefore, the defendants pray that the petition herein be dismissed.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,
Attorneys for Defendants.
Office and Post Office address,
32 Liberty Street,
Borough of Manhattan,
New York City.

54

UNITED STATES OF AMERICA, }
Southern District of New York, } ss. :

HENRY F. KESSLER, being duly sworn, deposes and says, that he is the Chairman of the Board of Directors of Kessler & Company, Limited, of Manchester, England, a corporation organized and existing under the laws of Great Britain, one of the parties herein and united in interest with Frank Youatt, liquidator of said corporation, who has joined in this answer; that he has read the foregoing answer and knows the contents thereof, and

is acquainted with the facts alleged therein, and 55
 the same is true of his own knowledge except as
 to the matters therein stated to be alleged on in-
 formation and belief, and as to those matters he
 believes it to be true. That the grounds of his be-
 lief, as to all matters not stated upon his knowledge,
 are cables and letters received from the solicitors
 of the said corporation and of said Frank Youatt,
 as liquidator, from Manchester, England: That the
 reason why this verification is not made by Kess-
 ler & Company, Limited, is that the latter is a
 foreign corporation.

HENRY F. KESSLER.

Subscribed and sworn to before me } 56
 this 10th day of December, 1907. }

ROBERT F. BARRETT,
 Notary Public,
 New York County.

[SEAL.]

(Endorsed)—Defendant's Answer.—Filed Dec.
 10th, '07.

58

At a Term of the United States District Court for the Southern District of New York, held at the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 7th day of February, 1908.

Present—Hon. CHARLES M. HOUGH,
District Judge.

IN THE MATTER

OF

59

ALFRED KESSLER, RUDOLF E. F.
FLINCH AND WILLIAM K. GIL-
LETT, as co-partners, under
the firm name of Kessler &
Company, and said co-part-
nership of Kessler & Com-
pany,

Bankrupts.

LAWRENCE E. SEXTON
as Receiver,
Plaintiff,

60

AGAINST

KESSLER & COMPANY, LIMITED,
of Manchester, England,
Defendant.

Upon reading and filing the petition of Lawrence E. Sexton, Trustee in Bankruptcy of the above-named bankrupts, verified the 6th day of February, 1908, and upon the consent hereto annexed of Kessler & Company, Limited, of Manchester, England, and of Frank Youatt, Esquire, Liquidator

thereof, by McLaughlin, Russell, Coe & Sprague, 61
their attorneys, it is

Ordered that Lawrence E. Sexton, Esquire, as Trustee in behalf of the above-named bankrupts, be, and he hereby is substituted as plaintiff in the above-named action of Lawrence E. Sexton as Receiver, plaintiff, against Kessler & Company, Limited, of Manchester, England, defendant, now pending in this court in the place and stead of Lawrence E. Sexton, Esquire, as Receiver in bankruptcy of the above-named bankrupts.

C. M. HOUGH, *D. J.*

We hereby consent to the entry of the within 62
order.

February 6th, 1908.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,
Attorneys for Kessler & Co., Limited,
of Manchester, Eng.

64 UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. F.
FLINSCH AND WILLIAM K.
GILLET, as co-partners, un-
der the firm name of Kessler
& Company, and said co-part-
nership of Kessler & Com-
pany,

65

Bankrupts.

LAWRENCE E. SEXTON
as Receiver,
Plaintiff,

AGAINST

KESSLER & COMPANY, LIMITED,
of Manchester, England,
Defendant.

66

The petition of Lawrence E. Sexton, Esquire, as Trustee in bankruptcy of the above-named bankrupts, respectfully shows to this court:

I.—That your petitioner was appointed by order of this court, entered herein on the 8th day of November, 1907, Receiver of the property of the above-named bankrupts;

II.—That thereafter, by order of this court, entered on the 26th day of November, 1907, your petitioner as Receiver, was directed to prosecute his claim as Receiver to certain securities and property in the possession of Kessler & Company,

Limited, of Manchester, England, and any and all 67
claims of the bankrupt estate to the said property,
and the said order directed that it be referred to
the Honorable Peter B. Olney as Special Commis-
sioner to hear and determine the same upon the
merits;

III.—That thereafter your petitioner proceeded
as directed by the said order to prosecute such
claims before the Honorable Peter B. Olney as
Special Commissioner, and the proceeding has been
pending and is now pending before the said Hon-
orable Peter B. Olney;

IV.—That in the said proceeding your petitioner 68
as Receiver has filed a petition and as your peti-
tioner is informed and believes Kessler & Company,
Limited, and Frank Youatt, Esquire, liquidator
thereof, have filed answers to said petition sub-
mitting to the jurisdiction of this court and to the
trial of the questions on the merits before said
Special Commissioner;

V.—That your petitioner at a first meeting of
creditors of the above-named bankrupt, after ad-
judication had been duly had, was on the 30th day
of December, 1907, duly elected Trustee in bank-
ruptcy of the above-named bankrupts and has
qualified and is now acting as such.

Your petitioner therefore prays for an order 69
substituting your petitioner as Trustee in the said
proceedings before the said Special Commissioner,
in the place of your petitioner as Receiver afore-
said.

LAWRENCE E. SEXTON,

As Trustee, &c.

WALLACE MACFARLANE,

Attorney for Petitioner and
Trustee.

Office and Post Office address,

26 Liberty Street,

Manhattan,

New York City, N. Y.

70

STATE OF NEW YORK,
 Southern District of New York, } ss.:
 County of New York.

LAWRENCE E. SEXTON, being duly sworn, deposes and says that he is the petitioner named in the above petition and that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

LAWRENCE E. SEXTON.

Sworn to before me this 6th }
 71 day of February, 1908. }

A. M. HAYES,

[SEAL]

Notary Public 201,

New York County.

(Endorsed)—Petition and Order.—Filed Feb. 7,
 '08.

72

DISTRICT COURT OF THE UNITED STATES, 73

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E.
F. FLINSCH, and WILLIAM K.
GILLETT, composing the firm
of KESSLER & COMPANY,
Bankrupts.

LAWRENCE E. SEXTON, as trustee in Bankruptcy of ALFRED KESSLER, RUDOLF E. F. FLINSCH, and WILLIAM K. GILLETT, composing the firm of KESSLER & COMPANY, and the said KESSLER & COMPANY

AGAINST

KESSLER & COMPANY, LIMITED.

74

Please take notice that upon the affidavit of William M. Coleman, verified February 27, 1908, and upon the petition of J. & P. Coats, Limited, verified the same day, and upon all the pleadings and proceedings and the evidence adduced upon the hearings before the special commissioner herein, we shall apply to this court at a term thereof to be held for the hearing of motions on the second day of March, 1908, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order granting leave to J. & P. Coats, Limited, to file an intervening petition herein in the form annexed hereto and referring the same to Peter B. Olney,

75

- 76 Esq., as special commissioner, to hear and determine the same and for such other and further relief as may be just and proper.

New York, February 27, 1908.

WILLIAM D. GUTHRIE,
Attorney for Petitioner,
52 William Street,
New York.

To Messrs. McLAUGHLIN, RUSSELL, COE & SPRAGUE,
Attorneys for Kessler & Company, Limited,
and FRANK YOUATT, liquidator, etc.,
32 Liberty Street,
Manhattan, New York.

77

WALLACE MACFARLANE, Esq.,
Attorney for Lawrence E. Sexton,
Trustee in Bankruptcy,
26 Liberty Street,
Manhattan, New York.

JOHN LARKIN, Esq.,
Attorney for petitioning creditors,
44 Wall Street,
Manhattan, New York.

78

DISTRICT COURT OF THE UNITED STATES 79

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. F.
FLINSCH, and WILLIAM K.
GILLETT, composing the firm
OF KESSLER & Co., Bank-
rupts.

80

LAWRENCE E. SEXTON, as trustee in bankruptcy of ALFRED KESSLER, RUDOLF E. F. FLINSCH and WILLIAM K. GILLETT, composing the firm of KESSLER & COMPANY, and the said KESSLER & COMPANY.

AGAINST

KESSLER & COMPANY, LIMITED.

81

STATE OF NEW YORK,
County of New York,
Southern District of New York. } ss.:

WILLIAM M. COLEMAN, being duly sworn, deposes and says:

I.—I am an attorney at law and am employed in the office of William D. Guthrie, the attorney for the petitioner, J. & P. Coats, Limited. I have attended upon the hearings before Peter B. Olney,

82 Esq., the special commissioner in this matter, and am familiar with the facts and proceedings herein.

83 II.—This is an application on behalf of J. & P. Coats, Limited, for leave to file an intervening petition in a proceeding in bankruptcy between Lawrence E. Sexton, as receiver (now trustee) in bankruptcy of Alfred Kessler, Rudolph E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Company, as petitioner, and Kessler & Company, Limited, of Manchester, England, and Frank Youatt, as liquidator under the English Companies' Acts of said Kessler & Company, Limited, respondents, for the purpose of setting aside a transfer of certain securities by said Kessler & Co. to said Kessler & Company, Limited, on the ground that it constituted a preference voidable under the bankruptcy laws, and that said Kessler & Company, Limited, had reasonable cause to believe that it was intended to give a preference thereby, and on the further ground that said transfer was made with the intent and purpose on the part of Kessler & Company to hinder, delay and defraud their creditors or some of them. A schedule of such securities is annexed to the petition of Lawrence E. Sexton, as receiver in bankruptcy, 84 verified the 30th day of November, 1907, a copy of which is submitted herewith. The respondents filed a joint answer, denying generally the allegations of the petition and waiving their right to a plenary suit. A copy of such answer is also submitted herewith.

III.—On or about the 26th day of November, 1907, the claim of the estate of the above-named bankrupts to the securities above mentioned was referred to Peter B. Olney, Esq., as special commissioner, to hear and determine the same upon the merits. The pleadings above mentioned were

subsequently filed by the parties. Hearings before said special commissioner commenced on or about the 26th day of November, 1907, and have been proceeding from time to time. No further testimony remains to be taken on behalf of the petitioner or the respondents. The case is ready to be closed, but has been adjourned to March 3, 1908, in order to give J. & P. Coats, Limited, an opportunity to make this application. 85

IV.—The ground upon which said J. & P. Coats, Limited, seeks to intervene is that it is the holder and owner of four certain bills of exchange, dated August 27, 1907, drawn by Kessler & Company, the bankrupts herein, addressed to Kessler & Company, Limited, of Manchester, England, at sixty days' sight, amounting to the total sum of £20,000, which bills were duly accepted by said Kessler & Company, Limited, but were not paid when due, although a subsequent payment of £2,500, or twelve and one-half per cent., has been made thereon; that certain of the securities involved in this proceeding were charged with a lien in favor of Kessler & Company, Limited, to secure the payment of the drafts owned by said J. & P. Coats, Limited, and that said J. & P. Coats, Limited, is entitled to be subrogated to the rights of said Kessler & Company, Limited, in the premises, and to recover possession of said securities and to sell the same and apply the proceeds to the payment of the drafts owned by it. 86 87

The facts upon which the rights of J. & P. Coats, Limited, are founded are fully set forth in the petition of said J. & P. Coats, Limited, verified February 27, 1908, which is submitted herewith as showing the exact form of the proposed intervening petition sought be filed and made a part hereof.

88 V.—The reason why an application for leave to file this petition was not made at an earlier date is that, during the progress of this litigation, negotiations have been pending from time to time between the trustee in bankruptcy and Kessler & Company, Limited, for a settlement; and the attorneys for said Kessler & Company, Limited, requested that J. & P. Coats, Limited, should not intervene, as such intervention would prejudice the success of the negotiations. The attorneys for Kessler & Company, Limited, also stated to me that an arrangement might be made at any time by which Kessler & Company, Limited, would be
89 able to pay in full the bills of exchange held by your petitioner. Under such circumstances, an intervention did not appear to be necessary to protect the interests of J. & P. Coats, Limited. At the present time, however, the hearings before the special commissioner are about to close and no satisfactory assurances have been furnished that Kessler & Company, Limited, will ever be able to pay in full the bills of exchange held by J. & P. Coats, Limited, and it seems probable that they will not be able to pay in full. It is also contended on behalf of the trustee in bankruptcy that the failure
90 of Kessler & Company, Limited, to pay the drafts constitutes a breach of its contract of acceptance, which deprives it of the right to hold the securities. The interests of J. & P. Coats, Limited, are, therefore, no longer sufficiently protected by Kessler & Company, Limited, and it makes this application for leave to file an intervening petition, praying a decree, adjudging that it has a valid lien upon said securities for the amount due upon said bills of exchange held by it, as aforesaid, and that it is entitled to foreclose said liens and sell said securities and apply the proceeds to the payment of its said bills, rendering the surplus, if any, to said

Lawrence E. Sexton, as trustee in bankruptcy, for 91
the benefit of whosoever may be entitled thereto.

WILLIAM M. COLEMAN.

Sworn to before me }
February 27, 1908. }

ALAN FOX,

[SEAL.]

Notary Public,

New York County.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. F.
FLINSCH and WILLIAM K.
GILLETT, composing the firm
of KESSLER & Co., Bankrupts.

LAWRENCE E. SEXTON, as trustee in bankruptcy of ALFRED KESSLER, RUDOLF E. F. FLINSCH and WILLIAM K. GILLETT, composing the firm of KESSLER & COMPANY, and the said KESSLER & COMPANY

AGAINST

KESSLER & COMPANY, LIMITED.

92

93

INTERVENING PETITION OF J. & P. COATS, LIMITED.

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK :

Now comes J. & P. Coats, Limited, a corporation duly organized and existing under the laws

94 of the United Kingdom of Great Britain and Ireland, and leave having been first obtained to intervene in this cause, presents this its petition to this Honorable Court and avers as follows:

I.—That your petitioner is the owner and holder for value of four certain bills of exchange drawn by Kessler & Company, the bankrupts herein, dated the 27th day of August, 1907, addressed to Kessler & Company, Limited, of Manchester, England, a corporation, by each of which bills of exchange said firm of Kessler & Company directed said corporation of Kessler & Company, Limited, to pay to
 95 your petitioner, at sixty days sight, the sum of five thousand pounds sterling (£5,000).

II.—That said bills of exchange were duly presented to Kessler & Company, Limited, and were on or about the 6th day of September, 1907, duly accepted by it payable at Lloyd's Bank, Limited, 71 Lombard Street, London, England, due the 8th day of November, 1907, and that upon the due date of said bills of exchange, to wit, on or about the 8th day of November, 1907, the said bills of exchange were duly presented to Lloyd's Bank, Limited, for payment, as provided by said bills, and payment thereof was refused, whereupon the said bills of
 96 exchange were duly protested for non-payment, and notice of dishonor was duly given to all parties entitled thereto. An amount equivalent to twelve and one-half per cent. has, however, since been paid upon said bills.

Your petitioner further avers upon information and belief as follows:

III.—That on or about the 27th day of August, 1907, the said firm of Kessler & Company, in order to induce the said Kessler & Company, Limited, to accept and pay said bills of exchange, and for the purpose of securing the acceptance and payment of

the same, and as collateral security and indemnity 97
to said drawee therefor, duly set aside the securities stated below, and gave to and created in favor of said Kessler & Company, Limited, a valid lien upon said securities, and the right to sell the same and apply the proceeds to the payment of the said bills, in case the said drawer, Kessler & Company, should fail to furnish or supply funds with which to meet, pay and discharge said bills of exchange as and when the same should become due and payable, and thereupon and on said date notified said Kessler & Company, Limited, in writing, by letter as follows:

"We cabled you today we had drawn 98
£20,000 60 d/s on your good selves and have placed in a separate escrow against this the following:

\$25,000	Orleans Co. Quarry	
	1st 6s at 90.....	\$22,500
Note \$10,000	Orleans Co. Quarry	
	secured by bonds	
	at 75, Nov. 7.....	10,000
" \$10,000	Orleans Co. Quarry	
	at 75, Nov. 7.....	10,000
" \$4,775	Orleans Co. Quarry	
	at 75, Nov. 18....	4,775
" \$8,000	R. E. MacLea & Co.	
	due Dec. 5.....	8,000
" \$7,000	R. E. MacLea Co.	
	due Dec. 5.....	7,000
" \$5,000	R. E. MacLea Co.	
	due Dec. 5.....	5,000
" \$16,000	Milne Turnbull &	
	Co. Nov. 11.....	16,000
" \$17,000	Milne Turnbull &	
	Co. Dec. 27.....	17,000
" \$7,000	Milne Turnbull &	
	Co. Dec. 27.....	7,000
		<hr/>
		\$107,275"

100 IV.—And on or about the 4th day of September, 1907, said Kessler & Company, Limited, replied to said letter as follows:

“We also take note of the securities which you have lodged in a new separate escrow against your special drawing of £20,000 about which you cabled us, and which you advised in your ordinary correspondence received to-day.

We anticipate that this special drawing will not be renewed, and that your drafts on us generally will presently come to a more moderate level.”

101

V.—That said securities were changed from time to time by said drawer, Kessler & Company, and on the 25th day of October, 1907, consisted of the following: twenty-five thousand dollars (\$25,000) face value of bonds of the Orleans County Quarry Company; three promissory notes executed by Milne, Turnbull & Co.—one due the 11th day of November, 1907, for sixteen thousand dollars (\$16,000)—one due the 27th day of December, 1907, for seven thousand dollars (\$7,000)—and one due the 27th day of December, 1907, for seventeen thousand dollars (\$17,000); promissory note
102 executed by R. B. MacLea & Company, due the 5th day of December, 1907, for five thousand dollars (\$5,000); three hundred shares of the common stock and four hundred and sixty-six (466) shares of the preferred stock of the Cripple Creek Central Railway Company, all of said securities being of a total value not exceeding the sum to become due on said bills of exchange.

VI.—That on or about said 25th day of October, 1907, Kessler & Company, Limited, the drawee of said drafts, secured actual physical possession of said securities from Kessler & Company, the draw-

ers, in whose custody only the same had theretofore been for account, and as trustees or agents of Kessler & Company, Limited, and thereupon said drafts were by the latter deposited with the Hanover Safe Deposit Company, where the same now are. 103

That your petitioners were at said times the actual owners and holders of said drafts and claim the said securities under subrogation to the rights of said Kessler & Company, Limited.

VII.—That on or about the 30th day of October, 1907, said firm of Kessler & Company made an assignment for the benefit of its creditors, and on or about the 8th day of November, 1907, a petition in bankruptcy was filed against said firm and the individual members thereof, in the District Court of the United States for the Southern District of New York, and an order was then duly made and entered in said District Court, appointing Lawrence E. Sexton temporary receiver of the goods, chattels and effects of said alleged bankrupts, and by the same order the said Kessler & Company, Limited, of Manchester, England, and the Hanover Safe Deposit Company were enjoined and restrained from removing or otherwise disposing of the said securities, pending an investigation and decision as to whether the delivery of said securities constituted a preference voidable under the bankruptcy laws. 104 105

VIII.—That on or about the 31st day of December, 1907, the said Lawrence E. Sexton was appointed Trustee in bankruptcy, and has duly qualified and is now acting as such.

IX.—That the said Kessler & Company, Limited, of Manchester, England, has also suspended payment, and as your petitioner is informed and verily

106 believes, on or about the 18th day of November, 1907, Frank Youatt, of Manchester, England, was duly appointed a liquidator for the shareholders of said corporation, and has duly qualified and is now acting as such liquidator.

X.—That your petitioner is informed and verily believes that said Kessler & Company, Limited, of Manchester, England, has no claim upon the securities constituting said special escrow, except for the payment of bills of exchange owned by your petitioner, and that your petitioner has no means of obtaining the payment of the remainder due upon
107 its said bills of exchange, except by the sale of said securities.

Wherefore, your petitioner prays this Honorable Court for a decree adjudging that your petitioner has a valid lien upon said securities for the amount due upon said bills of exchange held by it as aforesaid, and that your petitioner is entitled to foreclose said lien and sell said securities and apply the proceeds to the payment of its said bills, rendering the surplus, if any, to said Lawrence E. Sexton, as trustee in bankruptcy, for the benefit of whosoever may be entitled thereto.

108 And your petitioner prays for all other and further relief to which it may be entitled.

J. & P. COATS, LIMITED,
By THEODORE FRELINGHUYSEN.

WILLIAM D. GUTHRIE,
Attorney for Petitioner,
52 William Street,
New York City.

STATE OF NEW YORK,
County of New York, } ss.:
Southern District of New York.

109

THEODORE FRELINGHUYSEN, being duly sworn, deposes and says that he is the agent in this transaction and attorney in fact of J. & P. Coats, Limited, the petitioner named in the foregoing petition, and knows the contents thereof, and that the allegations therein contained are true of his own knowledge, except as to those allegations which are stated to be made upon information and belief, and as to such allegations he believes it to be true.

THEODORE FRELINGHUYSEN.

Sworn to before me {
February 27, 1908. }

110

J. W. WOOSTER,

[SEAL.]

Notary Public.

(Endorsed)—Petition, Affidavit and Notice Filed
March 2nd, 1908.

111

112

At a Term of the District Court of the United States, for the Southern District of New York, held at the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 30th day of March, 1908.

Present—HON. GEORGE C. HOLT, *District Judge.*

113

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of ALFRED KESSLER, RUDOLPH E. F. FLINSCH, and WILLIAM K. GILLET, composing the firm of KESSLER & COMPANY,

AGAINST
KESSLER & COMPANY, LIMITED.

An application having been duly made to this court on behalf of J. & P. Coats, Limited, a corporation, for leave to intervene herein,

114

After reading and filing the affidavit of William M. Coleman, verified the 27th day of February, 1908, and the intervening petition of said J. & P. Coats, Limited, verified the same day, and due proof of service of a copy of said affidavit and petition and notice of such application having been made upon the attorneys for Kessler & Company, Limited, of Manchester, England, and Frank Youatt, as liquidator of said Kessler & Company, Limited, and also upon the attorney for the petitioning creditors herein, and after hearing Henry D. Hotchkiss, Esq., in support of said application and Alexander S. Andrews, Esq., of counsel for the trustee, in opposition thereto, and due deliberation having been

had, now on motion of William D. Guthrie, attorney 115
for said J. & P. Coats, Limited, it is

Ordered, that J. & P. Coats, Limited, be and it
hereby is granted leave to intervene herein and
to file the intervening petition annexed to the mov-
ing papers herein setting forth its claim that the
allegations therein be taken to be denied by the
trustee, without the filing of any formal reply to
any new matters alleged therein, and that the is-
sues raised by such answer be and the same hereby
are referred to Peter B. Olney, Esq., the Special
Master heretofore appointed, to take proof and re-
port with his opinion; and it is further

Ordered, that all the testimony and exhibits 116
heretofore taken before the Special Commissioner
stand, and that the intervention of these petitioners
be subject thereto, and that further hearings before
said Referee on said intervention, if any, proceed
so far as practicable from day to day in order that
the proceedings before said Referee be determined
without any unnecessary delay; and it is further

Ordered, that in the event of the intervenor suc-
ceeding on this application, the costs be paid out
of the bankrupt estate; and it is further

Ordered, that this order be entered *nunc pro*
tunc as of March 3rd, 1908, the day said applica-
tion intervene was heard by the Court.

117

GEO. C. HOLT,

U. S. D. J.

(Endorsed)—Order granting leave to intervene.
Filed March 31, 1908.

118

At a Term of the United States District Court for the Southern District of New York, held at the United States Post Office Building, Borough of Manhattan, City of New York, on the 23rd day of March, 1908.

Present—Hon. GEORGE C. HOLT, *District Judge*.

119

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Company,

Plaintiff,

AGAINST

KESSLER & COMPANY, LIMITED,
Defendant.

120

Lawrence E. Sexton having on or about the 8th day of November, 1907, by order of this Court been appointed receiver of Kessler & Company, composed as aforesaid, which order among other things enjoined and restrained the defendant herein from removing from the city or state of New York or elsewhere, or from transferring the securities referred to herein; and thereafter the defendant having, on or about the 23rd day of November, 1907, waived its right to a plenary suit and submitted to the jurisdiction of this court and moved this court that a special Master be appointed to hear and determine the issues between the parties upon the merits; which said motion was granted and an order was made by this court on November 26th, 1907, referring the claim of the receiver and of the

bankrupt's estate to the securities and property in question to Peter B. Olney, Referee in Bankruptcy as Special Master to hear and determine the same upon the merits; and thereafter in pursuance of the terms of said order, the receiver in bankruptcy proceeded as directed in and by said order and by pleading duly verified set forth his cause of action, to which defendant filed an answer setting forth its defences, and the issues joined by said pleadings having been brought to trial before said referee; and thereafter Lawrence E. Sexton having been appointed trustee in bankruptcy and having duly qualified and having been substituted as party plaintiff as trustee and having adopted as his bill of complaint the petition of the receiver herein; and the defendant having adopted its answer to said petition as its answer to said bill of complaint, and the hearings before said referee having continued thereafter and the case being still undetermined and at issue;

Now upon the annexed consent and upon motion of John Larkin, Esq., attorney for the plaintiff herein, it is

Ordered that this action be deemed an action in equity brought by Lawrence E. Sexton, as trustee in bankruptcy of Kessler & Company, bankrupts, both as individuals and as co-partners of the firm of Kessler & Company, against Kessler & Company, Limited, and that the pleadings interposed herein by the parties be deemed the pleadings in said action, and that the said action be deemed in all respects an action in equity by the trustee in bankruptcy brought in the United States District Court for the Southern District of New York in pursuance of the provisions of the Bankruptcy Statutes, and be governed by all the rules of Procedure and of Law with reference thereto. And it is

Further Ordered that the order of reference to Peter B. Olney, Esq., dated November 26th, 1907,

124 be and the same hereby is amended by striking out the words "Special Master to hear and determine the same upon the merits," and inserting in lieu thereof the following: "Master in Chancery to take the testimony in this cause and to report the same to this court with his opinion;" and the amendment hereby ordered to be made in said last mentioned order shall be deemed to have been made as of November 26th, 1907.

GEO. C. HOLT,
District Judge.

We hereby consent to the entry of the foregoing
125 order.

Dated March 18th, 1908.

JOHN LARKIN,
Atty. for Plaintiff.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,
Attys. for Kessler & Company, Ltd.,
and Frank Youatt, Liquidator.

(Endorsed)—Order.—Filed March 26th, 1908.

DISTRICT COURT OF THE UNITED STATES 127
FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. F.
FLINSCH and WILLIAM K.
GILLET, composing the firm
of Kessler & Company,
Bankrupts.

Before Peter B.
Olney, Esq.,
Special Com-
missioner.

128

NEW YORK, November 26, 1907, 4 P. M.

HEARING ON CLAIM OF THE RECEIVER AND OF THE
ESTATE OF THE BANKRUPTS TO CERTAIN SECURI-
TIES AND PROPERTY IN THE POSSESSION OF
KESSLER & COMPANY, LIMITED, OF MAN-
CHESTER, ENGLAND.

PRESENT.

Messrs. MACFARLANE, WHITNEY & MONROE, By
Wallace Macfarlane, Esq., for the Re-
ceiver.

JOHN LARKIN, Esq., Of Counsel for the Re-
ceiver.

Messrs. McLAUGHLIN, RUSSELL, COE &
SPRAGUE, For Kessler & Company, Limited,
of Manchester, England, and FRANK
YOUATT, Liquidator, By Frederick C.
McLaughlin and Rufus W. Sprague, Esqs.
WILLIAM D. GUTHRIE, Esq., By W. M. Cole-
man, Esq., For Spool Cotton Company
and J. & P. Coats, Limited.

129

Messrs. COUDERT BROTHERS, For Louis Drey-
fus & Company.

CRAVATH, HENDERSON & DEGERSDORF, For
Kleinworth & Sons.

130 Mr. Larkin: Your Honor, let me suggest this, if you please: At the request of Mr. McLaughlin, and for his accommodation, we are hurrying this proceeding very rapidly. Now, I think that the proper way to have the issues presented is that the Receiver should file a petition in his pleading stating what his claims are, and let Kessler & Company, of Manchester, file an answer to that petition and have issues properly raised, then, before the Referee. That can be done between now and the next hearing. Meantime, so far as the merits of this proceeding are concerned, I can say in a very few words what we propose to prove.

131 We propose to prove that Kessler & Company, of Manchester, and Kessler and Company, of New York, were very closely identified in business. As a matter of fact, some four or five years ago the head of both houses was one and the same person, William Kessler. William Kessler died, and, after his death the Manchester house was incorporated under the Companies Act. The New York house was a partnership, and continued to be a partnership. Their business relations were just as close as ever before, except that there was no common partner in each house, as before.

132 William Kessler was interested in the New York house—his executors—to the extent of an investment representing his capital which he left in the business at the time of his death. He was still more largely interested in the Manchester house of Kessler & Company. Various people interested under William Kessler's will were shareholders, and the Manchester house was practically dominated and controlled by the Kessler family. Their business alliance continued and became much more important. The amount involved, the amounts invested, the drafts bought and sold against the Manchester house were very, very large indeed. Now, that was the close, intimate family condition. It

was also a close business condition, which continued 133
down to the time that we had this panic in Wall Street, and the Knickerbocker Trust Company failed. Now, at about that time, Mr. Henry Kessler, who is the managing director of the Manchester house, appeared upon the scene in New York. The Manchester house is a corporation organized under the Companies Act.

The Referee: It is a corporation?

Mr. Larkin: Yes, sir. Naturally, they were carrying on the same general business in Manchester and in England as the New York house was here in New York. Now, the nature of the business——

134

Mr. McLaughlin: I think you are mistaken there.

Mr. Larkin: What they did do was to accept drafts drawn on them from time to time by the Kessler house here in New York. Now, at the time that this slump came in Wall Street, and various failures, these gentlemen in Manchester, England, were obligated, by reason of their acceptances, for a very large sum of money—very large. I cannot give you just exactly now how much it is, but something like three or four hundred thousand dollars.

Mr. McLaughlin: Upwards of £80,000, or about \$400,000.

135

Mr. Larkin: Thank you. That being the condition, and they being obligated by these acceptances to this very large amount—£80,000 or thereabouts—Mr. Kessler comes over here and spends two or three weeks here and eventually finds his way up to the office of Kessler & Company, about the week commencing the 21st of October. He is there from time to time from the 21st, 22d or 23d—23d, 24th or 25th—and on the 25th he goes, with a representative of Kessler & Company, of New York, to the safe deposit vaults of Kessler & Company, of New York. The safe is opened by a clerk of Kess-

136 ler & Company, of New York, and he there and then receives from this clerk of Kessler & Company, of New York, securities of the par value of something in the neighborhood of a million dollars. What their actual value is we don't know—cannot tell—but a long list of securities. He accepts these securities and gives a receipt. This was on the 25th day of October. On the 30th day of October, Kessler & Company, of New York, make a general assignment for the benefit of creditors. After the general assignment for the benefit of creditors was made, Kessler & Company, of New York, are put into bankruptcy, on the 7th of November, and a
137 decree adjudicating them bankrupts was entered here Friday of this last week.

Now, those are the facts, the salient facts, of the Receiver's claim. In other words, that this was taking possession of these securities at a time when they must have known of necessity of the condition of Kessler & Company; and the answer, as I understand, which they will make is that for some years past they had a way of doing business of something like this: On the 30th of June, 1903, the Manchester house received a letter from the New York house in which it was stated that certain securities would be set aside and treated as a protection
138 against what is called between the two houses as their "long drawings"—that is, drafts which are to be accepted by the Manchester house but payable at sixty or ninety days. They call that "long drawings."

Kessler & Company subsequently wrote, after that method of business was started, that Kessler & Company, of New York, would, as they saw fit, from time to time, change these securities, take them out and sell, replace them by other securities; and, as a matter of fact, under such written instructions from the Manchester house, Kessler & Company did take, from time to time, these

securities and sell them, put in other securities, without at any time first consulting or advising with Kessler & Company, of Manchester, as to whether or not they would be permitted so to do. These securities were kept in a safe in the safe deposit vaults of Kessler & Company in one of the safe deposit companies down here in Wall Street. 139

Mr. Kessler: Separately.

Mr. Larkin: Who said that?

Mr. McLaughlin: Mr. Kessler did—And I think that is a very important omission in your statement of the facts, Mr. Larkin.

Mr. Larkin: I am perfectly willing to state—

The Special Commissioner: You know, gentlemen, that this is not evidence. You know it will be my duty to take the evidence, and Mr. Larkin is endeavoring to give somewhat of a general statement as to what he claims to be the state of facts. It does not bind anybody. 140

Mr. Larkin: Now, these securities were constantly kept in the possession of Kessler & Company, of New York; they never were out of their possession. It is true that there will be some testimony given that they considered them as being kept separate, but our information is that it is purely imaginary—that they were kept just the same as any other securities were kept—in the safe deposit vault of Kessler & Company, of New York. 141

Never demanded possession, never sought possession and never actually received possession at any time until the 25th of October, five days before Kessler & Company, of New York, made their general assignment, at which time, on the 25th day of October, Kessler & Company were absolutely and hopelessly insolvent. Now, I suppose that the burden of establishing the validity of this pledge, or agreement, or lien, or whatever they may choose to call it will be upon those people.

Mr. McLaughlin: Absolutely not, sir.

142 Mr. Larkin: I simply stated, in a brief way, about what the issues are going to be.

The Special Commissioner: You did file a petition, did you not?

143 Mr. McLaughlin: No, sir. This petition which we filed here was an application to the United States bankruptcy court, which was granted, to give us all the relief in the power of the bankruptcy court from a condition which was involving irreparable damage to our client through an *ex parte* injunction having been granted in a proceeding to which it was not a party, restraining it in the use and disposition of its own property, which had resulted in our client's being thrown into bankruptcy; and it was directed that the claim which had been asserted by the Receiver and set forth in the affidavit of Mr. Larkin—*ex parte*—upon which our property is restrained—that that claim, which is a claim that our taking of the possession was a voidable preference in favor of creditors, be referred to your Honor as Master.

The Special Commissioner: Now, the object I had now was to see if we could not get some issues, so that, in the taking of testimony, we should not be all at sea.

144 Mr. McLaughlin: The issues are perfectly clear. The only possible ground on which this——

The Special Commissioner: I mean issues in the way of a petition or answer—something in the nature of pleadings.

Mr. McLaughlin: It seems to me quite immaterial whether a petition is now filed by the Receiver and we put in an answer, inasmuch as the claim which has been asserted against our Property is that, for a period outside of this proceeding—is merely the claim that the possession which we took of that property, as our own property, on October 25th, was either a voidable preference or in fraud of creditors, and, in either case, the burden of proof

would be on the Trustee in bankruptcy; and it is 145
on the Receiver in bankruptcy to attack the possession which we hold of property claiming as our own and to show that a voidable preference——

The Special Commissioner: What was your proposition in regard to framing the issues?

Mr. Larkin: My proposition was that a petition should be filed by the Receiver, and to which an answer should be made by Kessler & Company, of Manchester, and then you have issues framed.

Mr. McLaughlin: We have no objection to that, if your Honor thinks it is necessary.

The Special Commissioner: Don't you think we shall have something then to go by, and not take a 146
great deal of testimony that might not be relevant?

Mr. McLaughlin: It seems to me that the issues are clearly defined in the affidavit of Mr. Larkin, in which he claims that this was in fraud of creditors and was a voidable preference. Now, let the Receiver show that. That is the only issue.

The Special Commissioner: Do you admit the allegations contained in his claim?

Mr. McLaughlin: Positively not.

The Special Commissioner: Do you deny them?

Mr. McLaughlin: We do, sir.

The Special Commissioner: Where?

Mr. McLaughlin: Denied in our petition.

The Special Commissioner: Where is your peti- 147
tion?

Mr. McLaughlin: The petition annexed to this order to show cause here.

The Special Commissioner: Do the counsel here think that in this affidavit and petition we have the issues sufficiently framed?

Mr. McLaughlin: There are no issues framed by any papers here.

Mr. Larkin: I think we ought to frame them.

Mr. McLaughlin: I have no objection,

148 The Special Commissioner: The only question here is where the burden of proof is.

Mr. Larkin: We will file a petition setting up this claim, and he can file an answer.

The Special Commissioner: I suggest, wouldn't it facilitate the early taking of testimony to have that done?

Mr. Larkin: Undoubtedly it will.

The Special Commissioner: If you have any testimony that you want to offer to-night, we can take it, on the issues. We have three-quarters of an hour, if you like to go on.

Mr. Larkin: What I was going to do this afternoon—

149 The Special Commissioner: Can it be entered on the record that between this and the next hearing you will file a petition setting forth your claim?

Mr. Larkin: Certainly.

The Special Commissioner: And that you will put in an answer?

Mr. McLaughlin: Yes, sir.

The Special Commissioner: And that those will be considered the issues?

Mr. Larkin: Yes.

Mr. McLaughlin: Yes.

150 Mr. Larkin: I think we would save a great deal of time if such a proceeding were taken, because we shall allege in there that these people were bankrupt on the 25th of October. I assume that Mr. McLaughlin will admit that on the 25th of October—

Mr. Sprague: No, sir.

The Special Commissioner: You can frame your allegation as you think it ought to be.

Mr. Larkin: I shall compel them to deny that or admit it, and I shall draw my petition so that they will either be compelled to deny this as an essential element— To-day I would have to go on the assumption that they were going to deny.

Mr. McLaughlin: We will not take that course, 151
of denying things, just to put you to the trouble
of proving them. I assure you of that.

Mr. Larkin: Shall we proceed then, this after-
noon? Are you going to proceed, then, on the ques-
tion that they were not insolvent on the 25th of
October?

Mr. Sprague: We know nothing about that.

Mr. Larkin: I know; but you will have to know
something about that in order to frame an an-
swer.

Mr. McLaughlin: I don't know whether they
were or not, as a matter of fact, on that day.

The Special Commissioner: You do not? 152

Mr. McLaughlin: No, sir. We represent the pro-
visional liquidator appointed by the court in
England.

The Special Commissioner: That is, in the bank-
ruptcy proceedings?

Mr. McLaughlin: It is a winding up under the
English Companies Act. It is not in the bank-
ruptcy Court yet. The holders of these bills, which
have been accepted by Kessler & Company, Lim-
ited, of Manchester, England, are also represented.

The Special Commissioner: Who are they?

Mr. Coleman: We represent about a hundred
thousand dollars, notes owned by J. & P. Coats, 153
Limited.

Mr. Alfred Kessler, a witness subpoenaed
by counsel for the Receiver, appeared and
stated to the Special Commissioner that, as
he had not been served with a subpoena until
3 p. m. to-day, he had not had an opportunity
to consult with his counsel, who was not in his
office this afternoon, and therefore was not
represented at this hearing. He consented,
however, after being advised by the Referee,
to testify without representation by counsel.

154 ALFRED KESSLER, a witness called on behalf of the Receiver, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. LARKIN:

Q. Mr. Kessler, you were a member of the firm of Kessler & Company, of New York, weren't you?

A. Yes, sir.

Q. When did you become a member of the New York house of Kessler & Company? A. I think it was 1892.

Q. Who composed that firm at that time? A. There was Mr. Kissell and Mr. Ogden, Mr. William
155 Kessler and myself.

Q. How long did that firm continue? A. Well, now, that I don't know. Mr. Ogden went out, I think, about two or three years; I couldn't tell—after that. Then it was Mr. Kissell and Mr. William Kessler and myself.

Q. How long did that firm continue? A. Oh, I don't know; I couldn't tell you the dates, you know; that is impossible. But after that, then I think, the following year, I think Mr. Kissell went out and Mr. Flinsch came in.

Q. The following—what year? A. Well, after the year that Mr. Ogden went out. It was either
156 one or two years after that Mr. Kissell went out.

Q. Leaving Mr. Flinsch to come in? A. Leaving Mr. Flinsch to come in.

Q. Then your partnership was William Kessler, Flinsch and yourself? A. William Kessler, Flinsch and myself.

Q. How long did that partnership continue? A. Well, that continued till 1901. I couldn't tell you these dates, you know; I don't know.

By the Referee:

That is as near as you can recollect? A. That is as near as I can recollect.

By Mr. Larkin:

157

Q. What happened in 1901? A. My father died in 1901.

Q. Did your father die here—New York City? A. He had never been in this country.

Q. Where did he die? A. He died in Manchester.

Q. He was a member of the Manchester house? A. He was a member of both firms.

Q. And he continued a member of the Manchester house down to the time of his death? A. He was not active any more, but he was a member.

Q. Did Mr. Flinsch invest any capital when he came into your firm? A. You mean did he put in any capital? 158

Q. Yes? A. Yes.

Q. How much? (No answer).

By the Special Commissioner:

Q. From 1901, was there a new firm formed? A. Yes; Mr. Gillett came in.

Q. What was the firm from that time? A. Mr. Gillett and myself, Mr. Flinsch.

Q. Did that continue until the present time? A. Yes.

Q. And Mr. Flinsch, you say, put in some capital when he came in, in 1901? A. Yes. 159

By Mr. Larkin:

Q. How much capital did he put in? A. I forget. I don't know exactly. I would have to look that up.

Q. How much money did Gillett put in? A. Gillett put in \$300,000, part of which was in stocks.

Q. How much cash did Gillett put in? A. I forget.

Q. Did he put in any cash? A. Yes; he put in some cash.

160 Q. Well, \$10,000? A. Oh, yes; more than a hundred thousand dollars cash. But I can't tell how much unless I looked it up.

Q. Do you remember what securities he put in?

A. Yes; he put in Reduction stock.

Q. Is that all? A. Yes.

Q. What do you mean by saying "Reduction stock"? A. What do I mean?

Q. Yes? A. Just the same as if you were to say "Pennsylvania."

By the Special Commissioner:

Q. What is it—a corporation? A. United
161 States Reduction & Refining Company.

Q. A corporation? A. Yes.

By Mr. Larkin:

Q. How much of that stock did he put in? A. That I can't tell you, because I don't know how much capital he put in.

Q. What became of that stock? A. We sold it.

Q. Converted it into cash, did you? A. Yes. Whether it was the identical stock or not, I don't know; that I couldn't tell.

Q. How much capital did your father have in the business? A. He didn't have any in the busi-
162 ness.

Q. He didn't have any in the New York house? A. Not in the New York house, except that money that was left over; but it didn't belong to my father any more. It belonged to the estate.

Q. You mean to say that your father didn't have any cash capital invested in the New York house?

A. He was in business, you know. We have gotten now to the time when my father is dead and gone.

By the Special Commissioner:

Q. What he wants to know is this: Whether, at the time just before your father's death, he had

any capital invested in that firm? A. Oh, yes, 163
It was about the same amount that Gillett put in,
including his stock. It was just about the same
amount.

Q. Well, it was something under \$300,000. A.
Something like that.

Q. Well, the books show, do they not, what the
exact amount is your father put in? A. Yes.

Q. Your father had cash invested, did he not?
A. Yes.

Q. Now, the Manchester house was the parent
house, wasn't it? A. You are going back now to
the old firm?

The Special Commissioner: Yes, to the begin- 164
ning of things.

A. Yes, the old firm. My father was the only
one who had interest in the two firms.

The Special Commissioner: Ask him when the
Manchester house ceased to be a copartnership and
became a corporation.

The Witness: I don't know.

By the Special Commissioner:

Q. Don't you know about when it was? A. No;
I couldn't tell you.

165

By Mr. Larkin:

Q. Now, your father had a certain cash capital
invested in the New York house, of which he was
a member at the time of his death. Is that right?
A. Well, yes, he had; remitted part of it over to
the Manchester——

Q. And part of it—which was something under
three hundred thousand dollars—in stock? A.
Yes.

Q. How much did you remit to Manchester? A.
I forget; I can tell you what the capital——

166 Q. You can tell how much was capital? A. But I can't tell you how much was remitted.

Q. How much was capital? A. We kept about ninety or ninety-five thousand dollars, and the estate made a loan to Flinsch and myself—rather, to me, really.

Q. The estate left in—— A. There were two transactions.

By the Special Commissioner:

Q. The both houses? A. Yes.

By Mr. Larkin.

167 Q. The estate left in there about \$95,000 in cash? A. Yes.

Q. Now, subsequently to that, you and Flinsch borrowed some money from the estate? A. Yes.

Q. And that money which you borrowed from the estate you and Flinsch invested in your business—is that it? A. It was practically invested in the business.

Q. Now, your father died some time in 1901? A. Yes; 28th of January, 1901.

168 Q. Are you sure it was not 1902? A. No. I don't think so, because Gillett was already a member then. You see, Gillett had not become a member as long as my father was alive. He only came in afterwards.

Q. It was after your father's death, then, that the Manchester house was incorporated, wasn't it? A. Yes.

Q. Do you know who the incorporators of that were? A. No.

Q. Well, your father had a large interest invested in that house at the time of his death, didn't he? A. I don't know. I never knew anything about the Manchester house.

Q. You know, of course, that he was largely interested in the Manchester house, don't you? A.

No; he was not very largely interested in the Manchester house. 169

Q. You say your father was a member of the Manchester house before it was incorporated, don't you? A. Yes, sir.

Q. And he was a member of the firm at the time of his death, wasn't he? A. Yes.

Q. And you mean to say that he didn't have a large cash investment in that firm prior to his death? A. In the Manchester house?

Q. Yes? A. No; I don't think he had.

Q. Now, after your father's death, the Manchester house was incorporated, wasn't it? A. Yes.

Q. Well, now, don't you know that the executors of your father's estate were shareholders in the Manchester house? A. I don't know as to what extent. 170

Q. I ask you if you don't know they were shareholders in the Manchester house. I didn't ask you to what extent? A. Who—the executors?

Q. Yes? A. Yes, they were.

Q. Now, don't you know that the executors received shares to represent the amount of the investment of your father in the original partnership? A. Yes.

Q. You do know that, don't you? A. Well, I know that that did happen. 171

Q. And that those shares which your father received were valued up among people interested under his will? A. Yes.

Q. And you, as one of the beneficiaries under his will, received shares? A. Yes.

Q. Now, what other member of your family received shares under his will? A. Well, they all received shares.

Q. Well, all? Who are they? Mention them? A. My brother, P. W. Kessler, Edward Kessler,

- 172 George A. Kessler, and my sister, Letitia Ashton, and my other sister, Emily Solly.

Q. Do you know the amount of shares which your father's executors received as such? A. No.

Q. Did you receive the shares which you say that you did receive from your father's executors? A. Did I receive them?

Q. Yes? A. Did I?

Q. Yes. Who did you get your shares from? A. I don't know. My brother wrote me that I had been allotted so many shares, and he kept them there to cover that loan they made to me.

Q. Who made to you? A. The estate.

- 173 Q. This loan that you mentioned a minute ago as being made to you and Flinsch? A. Yes, sir, made to me.

Q. And he kept them as security for that loan? A. I never got them. They were held there.

By the Special Commissioner:

Q. Where? A. In Manchester, England.

Mr. McLaughlin: I understand that the shares of the estate of William Kessler were never divided; never been any distribution. The witness is mistaken.

- 174 Q. Mr. McLaughlin says the shares of the estate of William Kessler have never been divided. A. I didn't get it.

Q. What was it they held as collateral for some loan? A. I don't know. He simply said it amounted to so much. I don't know; all I know is when I get dividends. That is all I know.

Q. The only thing you are interested in is the dividends? A. That is all I am interested in.

Q. Whether or not you received the shares to which you are entitled did not concern you at all? A. Well, I haven't ever made any inquiries about it.

By the Special Commissioner:

175

Q. Do you want to correct your statement which you testified to in regard to the distribution of your brothers' and sisters' shares from your father's estate—the fact that you received your shares and they received their shares? A. I never said they received their shares.

Q. You said it by implication. Do you want to correct that statement? A. The best thing for me is to correct that statement and say I don't know anything about the Kessler & Company division of the stock, of their shares.

By Mr. Larkin:

176

Q. You must have known, Mr. Kessler, that the Manchester house was the important house—had branches in different parts of the country, didn't they? A. They had a branch in Bradford.

Q. You conducted business with Kessler & Company in South America at one time? A. Yes.

Q. They had a New York office? William Kessler—he was head of the Manchester house? A. That was at that time—might have been considered the same business, but ever since my father died it is absolutely separate.

Q. That is what I am trying to get at. Practically, you were carrying on the same business in New York that you did at Manchester—the banking end of it? A. The only business we had with Manchester, really, was drawing those long drafts and now and then sending them cotton bills and grain bills to be accepted, or something, and then to have them sent to somebody in London.

177

Q. You received your directions from Manchester? When it came to any question of policy, you received your directions from your father, who was head of the Manchester house? A. In those days, now and then he used to make suggestions; yes.

178 Q. Now, as compared with the New York house, the Manchester house was the more important house, wasn't it at the time that your father was living? A. Yes, I suppose so.

Q. I think you have said that you don't know what the capitalization of the Manchester house was. Do you? A. No, I don't know.

Q. You have also said you don't know what the amount of the interest of your father's estate is in the Manchester house? A. No; except what I have got written in the books of the firm. I have got written down there so many shares of stock.

Q. So many shares of stock? A. So many
179 many shares of stock.

Q. Well, now, you are referring now to the shares which your father's executors hold? A. Yes.

Q. Now, you heard Mr. Henry Kessler state to you about the method by which you acquired certain shares in this corporation, did you not? A. Yes.

Q. How did you get the shares which were pledged by you as — A. I never got the shares; I never got them.

Q. You never got any shares? A. No.

Q. Neither by purchase nor as interested under your father's will? A. No; I never got those
180 shares.

Q. Then you don't know what they are holding over there against you? A. No, except what I have got written down; that is all, and I suppose that must be the approximate amount.

Q. What book is there that has written down about the shares in the Manchester house? A. Under my account—what we call the "Owners' Book."

Q. In the "Owners' Book"? A. Yes.

Q. Therefore, if it is in your account in the Owners' Book, it would be your individual interest—whatever it may be—in the Manchester

house, as a shareholder? A. Well, I suppose so; 181
yes.

Q. Don't you know? A. No, I don't know.

Q. Now, Mr. Henry Kessler says that is not so?
A. Well, that may be.

Mr. Sprague: We furnish you with a copy of
the holdings, and of the Manchester Company's
holdings.

Mr. Larkin: I am going to ask him about it.

Q. Now, do you know? I will show you this
paper, which has been handed to me by the counsel
for the Manchester house, and ask you to look at it.

A. (after looking at paper) I never have seen that
account, and so I don't know. 182

Q. Well, in looking at it, does it refresh your
recollection as to who the shareholders in the Man-
chester house are? A. No.

Q. It does not? A. No. I only read my own
name. I did not look for anyone else's.

Q. Now, you know that your name appears here
—"Alfred Kessler, 3,000". What does that mean
—three thousand shares or pounds? A. Ask them;
I don't know.

Q. You don't know anything about it? A. No.

Q. Well, now, you have heard Mr. Sprague state
to me a minute ago that this was a list prepared
of the shareholdings in that company? 183

Mr. Sprague: Pounds.

Q. Aren't you able to state what that means?
A. It means pounds.

Q. You heard Mr. Sprague say it was three
thousand pounds? A. Yes.

Q. Now, are you able now to state what that
three thousand pounds represents? A. No.

Q. Are you able to go as far as this, as to say
that it is three thousand pounds of shares in this
company, representing interest—exclusive and out-
side of the interest which you have inherited from

184 your father? A. No; I don't know anything about it.

Q. You knew that your father had a cash interest

Q. I think you have stated that you don't know the amount of the capitalization of the Manchester house? A. I don't know exactly what was paid up; no.

Q. When it was incorporated, were you consulted on the subject? A. No.

Q. Do you know whether your sisters or brothers were consulted? A. No; I don't know.

Q. Your recollection is now that you were not consulted? A. I know that I was not consulted.

185 Q. Well, were you surprised when you first learned that the thing had been incorporated? A. No.

Q. You were not? A. No.

Q. Did you make any protest about it? A. No; I didn't make any protest. It didn't concern me.

Q. You knew that your father had a cash interest in the house, didn't you? A. I know that my father had an interest in that house.

Q. And you knew that, if that interest was like that, you would receive your share of the money? A. Yes; I suppose I would.

186 By the Special Commissioner:

Q. "I suppose I would have received it"—is that the answer? A. I suppose I would have received it.

Q. Didn't your sisters or brothers consult with you on the subject of this incorporation? A. No.

By the Special Commissioner:

Q. Do they live in this country—some of them? A. No; none of them.

Q. Do they live in England? A. All live in England.

By Mr. Larkin:

187

Q. You have been in England since the incorporation of this company, have you not? A. Yes, for two weeks at a time I have been at home.

Q. Every year? A. Every year? No. I go there now and then. I was there on the other side last year.

Q. And were you over there at the time of your father's death? A. No.

Q. You did not go over at any time in connection with the incorporation of this company? A. No.

Q. Are you able to state who the directors of this company are now, at the present time? A. Well, I can't name them all; I don't know.

188

Q. Well, you know that Mr. Henry Kessler is a director, don't you? A. Mr. Henry Kessler is a director, and my brother, P. W. Kessler, and George Bederick.

Q. Is George Averdieck any relation of yours? A. No.

Q. Married anybody in your family? A. No.

Q. Then your recollection is that there are three directors of this company now? A. My brother, George.

Q. Then, out of four directors, three Kesslers are members of that board of directors—George and Henry and P. W. Kessler? A. Yes.

189

Q. When was your last partnership formed in New York here, Mr. Kessler? A. It was after my father died, I know that, but all those things are in the books. I don't know. This partnership? This is the end of the year; that would be the end of the sixth year—January 1st, 1902.

Q. The partnership was renewed, wasn't it? A. It expired the end of last year.

Q. It was renewed for one year? A. It was renewed for one year.

Q. That would make it expire on the 31st of December of this year, wouldn't it? A. Yes, sir.

190 Q. You remember making a general assignment here, do you not? A. Yes.

Q. At the time that that general assignment was made, do you remember Mr. Flinsch was abroad? A. Yes.

Q. Where was your other partner, Mr. Gillett? A. He was staying at the Hotel Belmont.

Q. Was he in a condition for you to consult with him? A. Well, I don't know. Now and then I thought he was, and now and then I thought he wasn't.

Q. Who were advising you at this time—at the time you made a general assignment? A. No one.

191 Q. Who have you been consulting with? A. At the time of the assignment?

Q. Yes. A. Well, I didn't consult with any one, really, at first.

Q. You consulted with Mr. Gillett, so far as you were able to, didn't you? A. Oh, yes; I consulted with him.

Q. And told him that you couldn't continue? A. I told him we could not continue unless he put up some money, and he said, Well——"

By the Special Commissioner:

192 Q. When was that? How long before the assignment? A. That was on the Saturday afternoon before we failed, and then he said, "Whatever you do, you must not assign; I will get the money somewhere." And he tried to get the money. I don't know whether he did or not.

Q. You don't? A. No, sir.

By Mr. Larkin:

Q. I understand you to say that that special consultation with Gillett which you just now refer to was on the Saturday prior to the assignment? A. That was on the Saturday.

Q. Saturday afternoon prior to the assignment? 193
A. Yes, about one o'clock.

Q. Now, that day, then, was the 26th of October, wasn't it? A. It was a Saturday.

Mr. McLaughlin: It was the 26th.

The Special Commissioner: You all agree to that?

Mr. Larkin: Yes, sir.

Q. Mr. Kessler, do you wish to be understood that on the Saturday, the 26th, was the first time you consulted with Mr. Gillett on the subject of an assignment? A. Yes.

Q. Do you wish to be understood—— A. In 194
fact, I don't think I mentioned the word "assignment", because I didn't think we would have to.

Q. Why did he say to you, then, that by no means were you to make an assignment, or words of similar import? You just now said that. Why did he say that? A. Excuse me; I want to retract. That was on the Monday when I called to see him. That was on the Monday when I went to see him at the Belmont.

By the Special Commissioner:

Q. You called to see him on Saturday and then again on Monday—is that it? A. Yes. 195

By Mr. Larkin:

Q. Well, now, are you quite sure it was not on the 25th you went to see him? A. No.

Q. When you turned over these securities to Mr. Henry Kessler? A. I never turned over any securities to Mr. Henry Kessler.

Q. Do you understand that Mr. Kessler went to your safe deposit vaults on the 25th of October? A. I don't know what date it was.

Q. Don't you know that Kessler & Company, of

196 Manchester, gave a receipt, which bears date the 25th of October? A. I never saw the receipt.

Q. I understand you to say that Mr. Kessler went over to the safety deposit vaults and took out some securities and gave them to the Manchester house? A. No; he would not go without my consent. I didn't say that.

Q. And did you tell him to go? A. I didn't tell him to go.

Q. Did you ask him to go for you? A. I don't know. I don't think I spoke about it; I couldn't tell. The securities didn't belong to us.

Mr. Larkin: I move to strike out his answer.

197 The Special Commissioner: Yes; that is not an answer; that is a voluntary statement on his part. Counsel can bring that out, if they wish to do so. Then it would depend upon what the facts and circumstances are.

Q. What time was it, did you say, that you saw Mr. Gillett on Monday preceding the assignment? Was it in the morning or afternoon? A. During the afternoon. I expected he would come down on Monday morning. He did not come.

198 Q. Why did you expect him to go down on Monday morning? Did you send for him? A. I didn't send for him. It was very scarce that he didn't come down Monday morning.

Q. That is the only ground you had for expecting him on Monday morning? A. Well, I expected him.

Q. Well, was it the result of your conversation on Saturday that you saw him on Monday? A. No.

Q. Did you see him on Sunday? A. No.

Mr. McLaughlin: I would like to make a motion. 199
I have only just received a copy of the minutes of the last meeting, and I find set out at length in those minutes this summing up of Mr. Larkin, in advance of his proof, which we regard as somewhat remarkable. I think it is no part of this record and that it should be stricken from the record. It contains many statements—

The Special Commissioner: What I wanted that there for was to see what we were here for. That is all. I think it would be better, rather than strike it out, Mr. McLaughlin—wouldn't it be better to put something in showing the object of it. I remember asking you counsel to make some 200
statement of what you are going to prove. I didn't have a copy of the petition or answer.

Mr. McLaughlin: As it stands on the record, Mr. Referee, it is a sweeping statement of the whole transactions, including not only the claims of the Receiver but the defense which we are to make, containing facts which we do not admit and which we deny—that Mr. Larkin cannot ever prove; and there is this set out in the record.

The Special Commissioner: Now, you put on the record—

Mr. McLaughlin: I would like to put on the record a motion to strike from the record the summing up of Mr. Larkin, of the claim of the Receiver, which begins on page 2 of the minutes. 201

The Special Commissioner: Yes; page 2 to—How far does it go?

Mr. McLaughlin: Runs through to just below the middle of page 8—on the ground that the same is wholly improper and has no part in the record in this case.

The Special Commissioner: Before ruling on this motion I wish to remind counsel that the issues having not been framed, that no issues having been framed when the matter came on at the last

202 hearing, I requested counsel to inform me what
the matters involved were. I do not consider Mr.
Larkin's statement as evidence but merely as a
statement of the claim that he made, or the people
whom he represented made, and there are some al-
legations made by Mr. McLaughlin which I con-
sidered merely for the information of the Court
and do not consider them evidence. But I am dis-
posed to let the record remain as it is. It will not
prejudice, in my judgment, either party, particu-
larly in view of the ground on which I deny the
motion, which is that it is merely a statement of
counsel for the information of the Court and not
203 evidence and not a part of the record so far as it
has bearing upon the issues concerned. You may
have an exception to that, if you like.

Mr. McLaughlin: I take an exception and state
that my objection to this statement is not that it
was improperly made, but merely that it is im-
proper to have it embodied in the stenographic
record of this proceeding as part of the record.

The Special Commissioner: Well, I will deny the
motion and give you liberty to renew it in the
course of the proceeding if you think it essential
to protect your rights.

204 Now, there is one matter here. The bankrupts'
attorney has made a petition and asked for an
order extending the time to file the schedules to
the 16th day of December. I stated to him that
there was no objection to that unless the rights of
the creditors or of the bankrupts' estate in some
way would be prejudiced by a postponement of the
election of the Trustee. The Trustee, under the
Bankruptcy Act, as you know, has larger author-
ity, larger powers, than the Receiver, and, if it is
going in any way to prejudice the rights of any-
body interested in the estate to postpone the elec-
tion of a Trustee, I suggest to counsel for the bank-
rupts that he can file a complete list of all the

creditors, with their addresses, that he knows any- 205
thing about, and then we can call a meeting. And
I think that I should give a twenty days' notice
instead of the usual ten days' notice because of the
foreign creditors. So that it will be along in the
latter part of December before we could elect a
Trustee in any event. Now, I do not know enough
about the state of the estate to know whether—

Mr. Larkin: Very essential there should be
a Trustee immediately.

The Special Commissioner: Then, Mr. Seymour,
you have a list of creditors, haven't you?

Mr. Seymour: Yes, sir; but I have not the ad-
dresses of them. It will take about a half hour 206
or so.

The Special Commissioner: You could file them
on Monday?

Mr. Seymour: Yes, and the list of claims—the
secured and unsecured creditors.

The Special Commissioner: You may take your
order extending the time to file the schedules on
condition that you do it on or before Monday.

Mr. Seymour: I cannot do it before, but on
Monday. Will your Honor say Tuesday?

The Special Commissioner: Yes, before Tues-
day. That will be the 3d of December. You make
up a sworn list of the names and the addresses of
the creditors, to the best of your knowledge and
information and the bankrupts', and then I think
we can call a meeting. Then we can extend the
time to file the schedules until the 16th day of De-
cember. 207

Mr. Seymour: And will that contain a statement
of the indebtedness?

The Special Commissioner: Not necessarily.

Mr. Seymour: Simply a list of the names of
creditors and the addresses?

The Special Commissioner: Yes. When your
schedules come in you want to put in all the facts;

208 now, a list of the creditors and addresses, so that we can have a meeting. It will be probably the end of the month.

Mr. Alfred Kessler: I would like to make some corrections in my testimony.

Mr. Larkin: I don't think this is the way, your Honor.

The Special Commissioner: Well, we will see. What is it, Mr. Kessler?

Mr. Alfred Kessler: Here on page 19: "You mean to say that your father didn't have any cash capital invested in the New York house? A. He was in business, you know. We have gotten now
209 what my father—he is dead and gone." It is not, "We have gotten now what my father;" it should be, "Now, we have gotten now to the time when my father is dead and gone."

The Special Commissioner: Is there any objection to making that correction?

Mr. Larkin: No, I have none.

The Special Commissioner: What is the rest?

Mr. Alfred Kessler: Still going on that page. If the Referee meant that my father had, just before his death, any capital in the present firm, I misunderstood his question; the balance of the answers on that page are in error. The Referee's
210 question was: "Whether, at the time just before your father's death, he had any capital invested in that firm." I understood the word "that" to refer to the firm of which my father had been a member—namely, the firm consisting of my father, Flinsch and myself, and not Flinsch, Gillett and myself. My father had nothing invested. I don't know what that word "that" means—whether the new or the old firm.

The Special Commissioner: I didn't suppose your father was a member of the firm after his death. Up to the time of his death he was, wasn't he?

Mr. Alfred Kessler: He was a member of the old 211
firm but not of the present partnership. He was
never a partner with Mr. Gillett.

The Special Commissioner: How could he be
when he was dead? Would you like to have it put
in? What was the firm name just prior to your
father's death?

Mr. Alfred Kessler: There was William Kess-
ler—

The Special Commissioner: What was the part-
nership—the name?

Mr. Alfred Kessler: Kessler & Company; always
has been, since 1838.

The Special Commissioner: Is there any am- 212
biguity there in this matter: "Q. What he wants
to know is this: Whether, at the time just before
your father's death, he had any capital invested in
that firm? A. Oh, yes. It was about the same
amount that Gillett put in, including his stock."
"Whether he had any capital invested in that
firm"—that is the New York house we are talking
about. Isn't that true?

Mr. Alfred Kessler: Yes.

The Special Commissioner: I don't think you
need to change it. That means the New York
house just prior to his death. What else is there
on that page?

Mr. Alfred Kessler: Now, the next is page 24. 213
I want to correct the answer to the second ques-
tion on that page. The question reads: "This loan
that you mentioned a minute ago as being made to
you and Flinsch? A. Yes, sir." The loan was
not made to Flinsch and myself, but rather to me,
as I stated on the top of page 21.

The Special Commissioner: I don't think there
can be any confusion about that. It is a sort of
brief statement of what the transaction was. There
can be no confusion about it. It corresponds to
what you say on page 21?

214 Mr. Alfred Kessler: No, sir.

The Special Commissioner: "Q. The estate left in there about \$95,000 in cash? A. Yes." "Q. Now, subsequently to that, you and Flinsch borrowed some money from the estate? A. Yes."

Mr. Alfred Kessler: That is wrong.

The Special Commissioner: I don't know. Now, it says here: "Q. This loan that you mentioned a minute ago as being made to you and Flinsch? A. Yes, sir." Of course he can correct it but it is plain enough to me.

Mr. McLaughlin: At the top of page 21, the witness says, "rather, to me, really."

215 Mr. Alfred Kessler: Because the estate had nothing to do with Flinsch in the matter, because I borrowed the money.

The Special Commissioner: The question was very direct and clear: "Now, subsequently to that, you and Flinsch borrowed some money from the estate? A. Yes.

Mr. Alfred Kessler: Yes.

The Special Commissioner: You must be more careful in your testimony and not contradict yourself repeatedly. We will make such corrections as you say, in order to get at the facts.

Mr. Larkin: I don't like the way——

216 Mr. McLaughlin: The fact is, Mr. Larkin, that the loan was made to Mr. Kessler.

Mr. Larkin: Where there is any question of the stenographer making incoherent answers or questions I have no objection to correcting it, but when I ask the witness simple questions and he answers clearly I do not see how you are going to go through the record after every hearing and make these changes. They will have an opportunity on cross-examination to clear up any doubtful points.

The Special Commissioner: I will modify the record as he has asked, but he should be more careful in his answers hereafter.

Mr. Larkin: I object to the corrections being made now. The proper time is when he is cross-examined by his own attorney, because you will find contradictions getting through the record, and, if we start in now and correct all these things after every hearing, we will never get anywhere. 217

The Special Commissioner: Perhaps, when you get through, you will have straightened out some of these things.

Mr. McLaughlin: I understand that this witness has an attorney in this proceeding.

The Special Commissioner: Do you represent the opposite side?

Mr. McLaughlin: I am not interested in changing that, because, for this present moment, it is not vital. This application comes from the bankrupt—to correct his own statement. 218

The Special Commissioner: I think the witness has a right to be represented.

Now, on page 24, the correction you need to make is this—that the loan was, in reality, out of the estate—was, in reality, made to you and not to Flinsch?

Mr. Alfred Kessler: Yes.

Mr. Seymour: On page 31, the name of the director is "Averdieck," not "Bederick."

The Special Commissioner: That correction should be made twice on that page. 219

Mr. Seymour: Yes. There is a matter of considerable seriousness on page 27. It is in regard to getting shares of his father's estate. Mr. Kessler and I have now been over the papers in regard to this matter, and Mr. Kessler finds, from the examination of his books, that he received 200 shares of the preferred stock and 400 shares of the common stock of Kessler & Company, Limited; that, immediately after receiving those shares, he returned them to the other side as collateral for this very loan we are speaking about which was made to him,

220 and that he still is of the opinion that the estate of Kessler——

The Special Commissioner: We don't care for his opinion.

Mr. Seymour: The witness answered the question whether his estate had been distributed; that he does not know.

The Special Commissioner: But he says it has been. He borrowed some money on it from the estate. He says it was distributed and he received it, and then he borrowed some money from the estate and pledged his collateral——

221 Mr. Seymour: That is, all that has been distributed.

Mr. Larkin: You will have an opportunity of making an explanation. I think, Mr. Referee, the proper time to make the change is when he cross-examines him.

The Special Commissioner: Yes, but you know, Mr. Larkin, I did say, before the bankrupt took the stand, that, as he was not represented, was all alone, if he had corrections to make we would let him make them.

Mr. Larkin: Can't they be corrected on cross-examination?

222 The Special Commissioner: Yes; but I said that he would have an opportunity afterwards to make corrections. That was when he was first sworn.

Mr. McLaughlin: I have one or two corrections——stenographic errors. On page 7, about the middle of the page, Mr. Kessler says "Separately." After that, Mr. Larkin said, "Who said that?" and I said, "Mr. Kessler," and before Mr. Larkin's statement—"Who said that?"—that is left out, and therefore it does not make sense.

The Special Commissioner: That is not important.

Mr. McLaughlin: Except that it makes an absolute break in the continuity there. My state-

ment is not intelligible, except in reply to Mr. Lar- 223
kin's.

The Special Commissioner: That may be inserted.

Mr. McLaughlin: On page 14, the middle of the page, according to the minutes, I state that we represent the holders of those bills. That is a mistake. We do not represent the holders of any bills. It should read that the holders of bills are also represented, being represented here by Mr. Coleman.

The Special Commissioner: Have you that correction?

Mr. McLaughlin: The statement I object to is 224
the statement that I represent them.

The Special Commissioner: Very well.

Mr. McLaughlin: Where it says, "We represent, also, the holders of these bills, which have been accepted by Kessler & Company," it should be: "We do not represent them," because those bills are represented by Mr. Coleman, who is here on this hearing.

Mr. Coleman: I would like a correction noted. On the second page, my initials should be "W. M." and not "W. L."

ALFRED KESSLER (direct-examination resumed). 225

By Mr. Larkin:

Q. Now, since the last hearing, Mr. Kessler, have you found counsel? A. It seems so.

Q. Yes, sir. Who is your counsel? A. Mr. Seymour.

Q. And did you see him after the last meeting? Did you have a talk with him after the last meeting? A. Never before—I had a talk with him since the last meeting.

Q. With any one else have you discussed this matter? A. No.

226 Q. Only just your counsel, Mr. Seymour? A. Yes.

Q. You have not explained to anybody at all about your testimony? A. No, I don't——

Q. Well, don't you know? Have you had your recollection refreshed as to any of these matters that you were questioned about at the last hearing? A. I have not talked about it. I talked——

Mr. McLaughlin: I object to this, Mr. Referee, on the ground that the counsel is cross-examining his own witness.

The Special Commissioner: He may answer the question. You may have an exception.

227

By the Special Commissioner:

Q. Do you understand the question? A. Whether I talked to any one? Well, I told Flinsch, of course, what had been going on, naturally.

By Mr. Larkin:

Q. Anybody else? A. I told Mrs. Kessler.

Q. Any one else? A. No; I don't know of any one else.

Q. Speak to any in the office—anyone else other than Flinsch in the office? A. No.

228 Q. There was no one with you when you consulted with your attorney—no one else present except yourself and himself? A. No; there was no one present.

Q. Who was employed in your office on the 25th of October, this year, 1907? A. Who were employed?

Q. Yes? A. I cannot tell you all of them. There were about twenty-five.

Q. Mr. McGee was there? A. Mr. McGee was there.

Q. How long had Mr. McGee been with you? A. He was with us before I came.

Q. Old and confidential employee, wasn't he? A. 229
Yes.

Q. Mr. McLean was with you? A. Yes, for some time, and then he left us for six or seven years, and then came back.

Q. How long had he been with you prior to the 25th of October, 1907? A. I don't remember, but it must be six or seven years or so.

Q. Mr. McLean was in charge of the foreign department, wasn't he? A. The foreign exchange.

Q. The bills of exchange department? A. The bills of exchange department.

Q. He was a confidential man? A. A confidential man.

230

Q. Mr. Nestly was also one of your confidential men? A. Yes; but he had nothing to do with foreign exchange.

Q. He was a confidential employee of yours? A. Yes, sir.

Q. And how long had he been with you? A. Oh, I don't know; some ten years, probably.

Q. Mr. Bertie Kessler—was he one of your confidential employees as well? A. Yes.

Q. How long had Bertie Kessler been with you? A. He must have been with us about four or five years, I suppose.

Q. Now, these men represented, really, your working staff, did they not? A. Yes. 231

Q. These are the men that you relied on to help you do your work, did you not? A. Yes; and Mr. Burnhart.

Q. What special business did Mr. Burnhart have? A. He had the credit department.

Q. And what else did he have to do? What did he have to do in the credit department? A. Well, he had to look after all these different accounts, and assigned accounts, and all those things.

Q. He had charge of assigned accounts? A. Well,

232 all the accounts that we dealt in, and the credit, letters of credit, and everything in that way.

Q. Now, was there anybody else that had important work in your office? A. No.

Q. Any special bookkeeper that had more to do with your books than anyone else? A. No. The head bookkeeper, of course, had more to do with the books than the two under-men. There were two under him.

Q. Now, Mr. McLean had charge of the foreign exchange department? A. Yes.

233 Q. Now, what special work did Mr. Nestly have to do? A. Well, he attended to the foreign investment part jointly with Mr. Bertie Kessler, and he also looked after a lot of these things that we were interested here in in this country.

Q. These men that you have mentioned—Mr. McGee, Mr. Bertie Kessler and Mr. McLean and Nestly—had the run of the office, had they not? A. Yes.

Q. They had access to your vault? A. No; not all of them.

Q. Now, Mr. Bertie Kessler—did he not? A. Yes; and Mr. McLean had and Mr. McGee had.

Q. They had also access to your books? A. They had access to the books, except the private book.

234 Q. What private book did you have that they did not have access to? A. Well, I had the private book which was in my control, just like any firm has a private book.

Q. Did you have any business matters go through this private book, as you call it? A. No. It was practically a recapitulation of the books.

Q. Are you speaking now of your private ledger? A. Yes.

Q. Showing your profit and loss account? A. Yes.

Q. Is that the only private book that you kept? A. Yes—the firm.

Q. The firm kept? (No answer.) 235

Q. Now, all of these people had access to your books at any time they saw fit to examine, did they not? A. Well, I don't know whether they saw fit to. They did, as a matter of fact.

Q. They had access to the books? A. They had access to the books.

Q. They were aware, were they not, what time the obligations of the firm were maturing? A. They could have been if they wanted to.

Q. Have you any reason to believe that they did not know what time the various obligations of the firm were maturing? A. That I couldn't tell you.

Q. Wasn't that Mr. McLean's business, for instance, to keep track of the obligations which were maturing from abroad? A. Mr. McLean's business? It was, yes. 236

Q. Now, isn't it the practice of your house that you or somebody should be notified ten days, for instance, before a draft became payable abroad, so that you could make arrangements to meet it? A. Not necessarily.

Q. Do you look through the books yourself to find out when all these drafts are payable every day? A. No.

Q. Who does that for you? A. I leave that to Mr. McLean.

Q. That only related to the foreign department. How about the domestic department? Whose business was it to report to you as to the obligations which were payable? A. I generally looked after that myself. 237

Q. Who besides yourself? A. Mr. Burnhart.

Q. That was the usual course or practice, when an obligation had to be met on the other side? How did you go about to do it? A. I did not do anything.

Q. Well, who did? A. Mr. McLean did.

238 Q. What did he do? A. Buy exchange, I suppose.

Q. Who would provide the money for it? Did he borrow money for you? A. No, the money was there.

Q. What do you mean by saying the money was there? A. He couldn't buy exchange unless he had the money, could he?

Q. I don't know. I am asking you. You might, for instance, have borrowed money against securities. A. Yes.

239 Q. Is that what you mean by saying the money was there? A. It doesn't matter whether you borrowed money or——

Q. Whose business would it be to negotiate a loan in order to secure money? A. I generally left it to Mr. McGee.

Q. Mr. McGee had charge of the loan accounts, did he? A. Yes.

Q. And it was his business, when it was necessary for the firm to have money, to take the securities and raise money on them? A. Yes.

Q. Under your directions? A. Not necessarily under my directions, no.

240 Q. Well, then, if Mr. McGee had to borrow money, he naturally must have known there were some obligations to meet with the proceeds of the loan—isn't that true? A. He would only know by Mr. McLean telling him, because Mr. McGee would not know anything about the foreign maturities.

Q. Would he know anything about the domestic maturities? A. Mr. McGee would.

Q. He would? A. Yes.

Q. So that McGee would know of his own knowledge about the domestic maturities and would be informed by McLean generally as to the foreign maturities? A. Yes.

Q. And make provision accordingly? A. Yes.

Q. You remember, do you not, the month of October last? A. Yes. 241

Q. You remember, do you not, what drafts were coming payable in the last part of October? A. Yes.

Q. Can you tell now what drafts there were that had to be met? A. No.

Q. Can't you remember some of them? A. No. They would be in that list (indicating), I suppose.

Q. In what list? A. In that list we are talking about.

Q. You mean your schedules of assets and liabilities? A. Yes.

Q. Please take that schedule of assets and liabilities and point out— 242

Mr. Seymour: This is a statement, merely a rough draft, handed to me by the bookkeeper this morning.

Mr. McLaughlin: I object to this, if your Honor please, on the ground that it is not a proper method of refreshing the recollection of this witness; that this evidence is directed to the point as to what this witness knew in the last week of October, 1907. In other words, to the witness' knowledge; his knowledge at that time, his recollection of what he knew at that time, cannot be refreshed by reference to the schedules which have been prepared in these bankruptcy proceedings. 243

The Special Commissioner: Does it make any difference how he refreshes his recollection? If a piece of stick will do it, that is all right. The question is whether you can refresh his memory; if a witness testifies generally that he knows about a matter and cannot remember details, it is allowable to refresh his memory by anything that will refresh it. Counsel can use their own ingenuity to try and refresh his memory.

Mr. McLaughlin: If this evidence is now offered simply to prove the fact that there were certain

244 drafts and that they were coming due at that time, I have no objection to it. If it is——

The Special Commissioner: You have not objected to anything except his right to use these schedules in order to refresh his memory, and, in regard to that, I think you are wrong. I think he can refresh his memory by anything that will refresh his memory, no matter what it is. You have not objected to the competency or relevancy of the evidence. You objected that he could not use these schdules to refresh his memory.

245 Mr. McLaughlin: I still make my objection to the witness being allowed to refresh his recollection on the point of what his knowledge was in the latter part of October of drafts then come due by reference to the schedules which have just been preparad and which were not then in existence.

The Special Commissioner: It does not make any difference. The names may recall it to him, the amounts may recall it to him. I still think it does not make any difference how or what means you use to refresh his recollection if, in fact, it does refresh his recollection. You might call up something that had passed out of his mind now that would immediately bring to his mind certain things that he knew then, that he a little while ago said he could not recollect. I think I will
246 overrule the objection.

Mr. McLaughlin: I take an exception.

The Special Commissioner: Please repeat the question.

(Question repeated as follows: "Please take that schedule of assets and liabilities and point out——")

The Special Commissioner: What.

Mr. McLaughlin: As to what drafts were coming due at that time. Unless it is shown that this witness had some knowledge of it or unless it is shown that we had some knowledge of it——

The Special Commissioner: He is trying to re- 247
fresh the witness' recollection by——

Mr. McLaughlin: He says he does not know.

The Special Commissioner: You know, Mr. McLaughlin, from your practice in trying cases, the way to refresh a witness' recollection.

Mr. McLaughlin: Not by that method.

The Special Commissioner: Any method which is legitimate, which answers the purpose.

Mr. McLaughlin: Well, I take my exception to that.

The Special Commissioner: Think a moment, and I think you will conclude I am right.

Mr. McLaughlin: I think it must be some data 248
or memorandum made at the time.

The Special Commissioner: It is here now; the question is put. Its relevancy? Why isn't it relevant?

Mr. McLaughlin: Well, we haven't seen the petition here that we were to have before this hearing.

The Special Commissioner: I have been reading your petition. It seems to set forth quite clearly your claim, so I have a pretty good idea of what your claim is. Of course, the question is whether these securities were pledged to the English corporation and whether, by what was done, they acquired a lien on them which the bankruptcy court is bound to maintain. You claim it is so. You 249
claim that there is a lien here in favor of the English corporation of Kessler & Company, Limited, which the bankruptcy court is bound to respect. Now, referring to Receiver's attorney, your claim, as I take it, is that there was at least an equity of redemption, an equity over the pledged property. Perhaps they intend to attack the legality of the pledge; if it was a pledge, whether the lien was such as Kessler & Company were entitled to enforce here against the general creditors. That is the main issue, isn't it?

250 Mr. McLaughlin: Well, I think that is one way of stating it, your Honor.

The Special Commissioner: Now, this witness does seem to me to be rather prejudiced—if he has any prejudice at all—in favor of the claim of the English company and against the claim of the general creditors. That may be right that he should be, and it is very natural that he should be; but, in any event, I should judge that he was rather a hostile witness to the general creditors. That is the impression which it made on me. That being so, of course the counsel for the general creditors should be allowed a pretty large latitude in examining him, so that I am not prepared to rule that the question is irrelevant. I am quite sure it is not incompetent, and I think it is relevant, so I will give you an exception and overrule your objection.

251

By Mr. Larkin:

Q. Please take that schedule of assets and liabilities and point out, if you please, the drafts which were about to mature in the week beginning October 21st, or October 28th.

The Special Commissioner: Both weeks, you mean?

252

Mr. Larkin: Yes.

The Witness: I cannot tell. This will not help me at all.

Q. It will not? A. No.

Q. Just suppose you cast your eye down that list and see whether your memory will not be refreshed, perhaps, as to one or two creditors whose drafts became payable in the week beginning October 21st or October 28th. See if you cannot remember one?

A. I cannot tell when any of these were due.

By Mr. Seymour :

253

Q. You have not gone through them all. There are 117 there. He asked you to go through the whole list. Just run through that list and see, will you? A. Yes.

By Mr. Larkin :

Q. There are 118 foreign correspondents, are there, Mr. Kessler? A. I should not think so.

Q. The houses through which you were doing the greater part of your business were comparatively few, were they not? A. About thirty, I should suppose.

254

Q. Did you ever hear of the house of Glynn, Mills, Curry & Company? A. Yes.

Q. Now that I have directed your attention especially to that house, can you state whether or not any drafts were becoming due and payable to them? A. Always on Glynn, Mills, Curry & Company a lot of drafts.

Q. And at this particular time, how much were the drafts—the two weeks beginning October 21st? A. Two weeks?

Q. Yes. A. We never went two weeks; we always went a week.

Q. Only a week? A. Yes.

255

Q. That is to say, you made provision to take care of the drafts that were coming due week to week? A. Practically dependent on the sailing of the steamer. Some go fast and others go slow.

Q. Now, what drafts were coming due in the week commencing October 21st? A. I don't see any of those things here. There are not any down here.

Q. And you haven't any recollection at all about the matter? A. I know there was something like forty thousand pounds falling due, but I couldn't tell exactly, and it isn't down here.

85

256 Q. To whom was the forty thousand pounds payable? A. Payable?

Q. Yes. Where did you have to make the payment of forty thousand pounds? A. In London.

Q. To what house? A. To Glynn, Mills, Curry & Company.

Q. Are there any books that you can refer to of any kind or description which would enable you to state the exact dates when these drafts were coming payable? Have you any books in your office? A. Yes. I don't know what they call it. There is the incoming exchange book; the outgoing exchange book, too.

257 Q. What is the incoming exchange? What does that mean? A. That is the exchange we buy.

Q. What is the outgoing exchange? A. The exchange we sell.

Q. Now, which of those two books would you want to refer to, to give the Referee a statement as to the drafts which you had to provide for on the weeks that I have referred to? A. The exchange we sell—when things mature on the other side.

258 Q. Now, you do recollect, do you not, that there were obligations for you to meet at Glynn, Mills, Curry & Company during those two weeks—October 21st and October 28th? Now, don't you remember whether there were any other obligations that you had to meet, other than Glynn, Mills, Curry & Company, in the same time? A. Nothing of any consequence, I don't think.

Q. Your recollection now is that the forty thousand pounds would represent the amount that you had to provide for Glynn, Mills, Curry & Company? A. Yes, sir—depends on what date.

Q. This forty thousand pounds represented the covering of exchange which you sold? A. Yes.

Q. Now, how did you usually go about to cover exchange that you sold like that? A. Well, we either bought exchange or we cabled—bought a

cable or took a cable, where we had credits in Amsterdam or Rotterdam or Berlin. 259

Q. Now, don't mix up Rotterdam, because you didn't have any drafts you had to cover in Rotterdam or Amsterdam? A. No.

Q. The drafts which were giving you trouble at that particular time were the drafts you had to meet in London, were they not? A. Yes.

Q. Isn't it true that within ten days or a week prior to the due date of the drafts which you had to cover that you had transferred from your long account to your short account? A. Yes.

Q. And that was done constantly in the course of your business, wasn't it—you transferred from the long account book to the short account book? A. Yes. 260

Q. After the transfer into the short account book, those whose business it was to attend to those drafts were immediately notified to make arrangements to take care of them, weren't you? A. I wasn't, I know.

Q. Who was? A. Mr. McLean.

Q. Or Mr. McGee? A. No; Mr. McGee had nothing to do with them.

Q. Mr. McGee had to borrow money, you said a minute ago, and, if it was McGee's business to do it—— A. Yes.

Q. Then he would know about it? A. No; he would not know anything about it. 261

Q. Well, do you mean to say he would not know the reason he was to go out and borrow money? A. No.

Q. McLean wouldn't tell him anything about it? McLean wouldn't say, "McGee, we have got to make such and such a draft, and you have got to take out securities and borrow money on them? A. He might; I don't know.

Q. Who did McLean notify—you and Flinsch,

262 when you were there, or McGee, immediately? A. Mr. McLean never notified me.

Q. Well, you were the head of the house, weren't you? A. Yes.

Q. And you are the only partner who was there in October? A. That is true; Mr. Gillett was there, but he only came down very seldom.

Q. Gillett was a sick man, wasn't he, and he gave very little attention to business? A. Very little.

The Referee: He answered that question.

263 Q. Now, Gillett wasn't there at this time? A. He was very ill. Some thought he was and some thought he wasn't.

Q. What did you know about it? A. I don't know, except he had locomotor ataxia.

Q. And he didn't go every day to the place in October? A. No.

Q. Take the week beginning Monday, October 21st. Didn't he attend the office at any time during that week? A. Yes; I think he was down once or twice.

Q. When was it you saw him at the Belmont Hotel? A. That was on the Monday, the 28th.

Q. You saw him then? A. Yes.

Q. That was the date you saw him? A. 28th.

264 Q. Well, now, you cannot remember the date Mr. Gillett was there at the office? A. No, I cannot.

Q. You didn't keep any record of it? A. No.

Q. Well, wouldn't the records in the office show the date that Mr. Gillett was there? Wouldn't there be some record of some transactions which he had in hand which would fix the exact date? A. I shouldn't think so.

Q. Did he draw any money or deposit any money? A. Well, that I can't tell you; I don't know.

Q. Well, how is it that you are able to say he was there during those two weeks? A. I don't know. I only think he was there; that is all.

Q. It may have been that he wasn't there at all? 265

A. It may have been.

Q. The most you state, then—is it because of your best recollection that you think he was there?

A. I don't know. You asked me the question, and I thought he was there.

By the Special Commissioner:

Q. You have no recollection at all? A. No.

By Mr. Larkin:

Q. So that is merely an impression you have in your mind—that he was there during the week beginning October 21st? A. Yes. 266

Q. Well, now, in the week beginning October 21st—that was a very busy and difficult week in New York City, wasn't it? A. I suppose so.

Q. The Knickerbocker Trust Company closed its doors on the morning of the 22d, didn't it? A. I don't know.

Q. You don't remember that the Knickerbocker Trust Company closed its doors or the date? A. I don't remember the date.

Q. Well, don't you remember now reading of the meeting of the officers of the Knickerbocker Trust Company on Sunday night? A. Yes.

Q. You remember that, don't you? A. Yes. 267

Q. And you remember that an effort was made to assist the Knickerbocker Trust Company on Monday, the very next day? (No answer.)

Q. Didn't you hear about that in Wall Street? A. Yes, but I wouldn't mention the dates now, because I don't know anything about those dates.

Q. You heard about their making application for assistance on Monday, the 21st? A. I don't know whether it was Monday.

Q. You remember hearing they applied to the Clearing House for assistance? A. Yes.

268 Q. You remember that the very next day they closed their doors, don't you? A. Yes.

Q. And you know that immediately they closed their doors a run started on the Trust Company of America, right opposite your building? A. Yes.

Mr. McLaughlin: If it is a fact that it is the 22d, we will admit it—that the Knickerbocker Trust Company closed its doors.

The Special Commissioner: Put it on the record.

269 Q. Can't you remember those matters being called to your attention—whether or not Mr. Gillett came down and talked with you about firm matters? A. No; I don't think I had any talk with him on firm matters.

Q. You also knew, didn't you, that to borrow money was practically impossible in New York City at that time? A. Yes.

Q. And you could not borrow it? A. Yes.

Q. And that the Stock Exchange, on Thursday of that week, nearly closed through lack of money? Did you know that? A. Yes.

Q. And still you are not sure whether Mr. Gillett was down there to talk with you? A. No, I couldn't say.

Q. And you didn't ask him to come? A. No.

270 Q. You wrote to Mr. Henry Kessler, your uncle, when he was coming back, didn't you? A. No.

Q. But he says you did? A. Oh, when he was in Atlantic City? Oh, I thought you meant here.

By the Special Commissioner:

Q. Did you or didn't you? A. Yes.

Q. And what time was that? A. Oh, I can't tell that.

By Mr. Larkin:

Q. Don't you keep a letter book? A. Oh, but I never keep those letters; no.

Q. You remember writing to him at Atlantic City—or perhaps you remember how soon he came after the receipt of that letter. Do you remember that? A. Oh, I don't know. He didn't come for some time, I think. 271

Q. You remember that he came into your office on the 22d of October, the day that the Knickerbocker Trust Company failed? A. No; I don't know whether it was the 22d.

Q. Do you know whether he was there on the 23d? A. No; I don't know.

Q. Do you know whether he was there on the 24th? A. No; I don't know.

Q. Do you know whether he was there on the 25th. A. No; I don't know. 272

Q. Do you know whether he was there on the 26th? A. No; I don't think he was.

Q. That was the date he was supposed to have taken these securities, Mr. Kessler? A. Well, then, he, perhaps, was there; I don't really remember those dates.

Q. Haven't you any record at all that you can refer to to refresh your recollection about the matter? A. No; I have not.

Q. Well, now, you endeavored to raise money, did you not, during that week in order to meet the drafts which you had to take care of in London? A. Yes. 273

Q. Did you do it yourself or did McGee do it? A. I did some of it.

Q. Where did you apply to borrow? A. Well, I called at three or four different places.

Q. Well, where? A. I don't know. I went to Iselin & Company, I think. Oh, I don't know; I went to two or three places.

Q. Well, can't you remember any other place than Iselin & Company? Did you have any special friends that you thought you would be more likely

274 to borrow from than Iselin & Company? A. Well, I went to Morgan.

Q. Well? A. But that was long after that; that was practically the night before we failed.

Q. Well, that is the last loan you got from Morgan? A. Yes.

Q. Where was it that you tried to get loans at this time and failed, besides Iselin? A. Well, I tried the Corn Exchange Bank. I tried the City Bank.

Q. Do you remember the dates you tried?

By The Special Commissioner:

275 Q. You say the night before your failure. What was that date? What is the date of the failure? A. The date of the failure was the 30th. I am not good at dates. It was a Wednesday, whatever date that was, if that is what you mean.

Q. Wednesday was the 30th of October? A. Yes.

By Mr. Larkin:

Q. Now, where else did you try and borrow money in the week beginning October 28th besides the Corn Exchange Bank, Iselin and the City Bank?

276 A. Well, I tried a friend of mine, Vernon Brown, but he said he could only let me have it overnight. I said that was not very good.

Q. Well, were you able to secure a loan during that week? How long were you working at that? I will withdraw that first question. How long did you work in your effort to get a loan at that time? A. Oh, two or three days, I think, I was trying—

Q. Do you know that during all that, that Mr. Henry Kessler was in your office from day to day? A. Oh, he might have been, yes.

Q. Well, don't you know that he was?

Mr. McLaughlin: I think that that time ought 277
to be fixed a little more closely, Mr. Referee—before
or after the 25th of October.

The Witness: This is after the week—after October—
we are talking about. This is after the 25th, the time
we are talking of. This is on the Monday that I am
talking about—Monday, Tuesday, Wednesday.

Q. You are talking about Monday, Tuesday and
Wednesday. That would be October 28th, 29th and
30th? A. Yes.

Q. Was it Monday that you went to these different
institutions? A. Monday or Tuesday, I don't
know which. 278

Q. Have you any record in your office which you
could refer to? A. No, I don't keep them.

Q. You took a note with you, undoubtedly—
dated, wasn't it? You expected to get your loan?
A. No, there was no date on it.

Q. Do you leave the dates blank when you go to
get a loan. A. I did not take a note with me.

Q. Did you take any securities with you? A. No.

Q. You are unable to fix whether this is on Monday,
the 28th or 29th? A. Yes; I don't know.

Q. Now, you know, as a matter of fact, don't you,
that, although your assignment is dated October
30th, you were consulting in regard to making an
assignment long before that date? A. No, I
wasn't. 279

Q. You were not? A. No.

Q. You mean to say that this assignment, which
was in typewriting, was prepared on that very day
it was filed and executed? A. The first I knew of
it was Tuesday night—Tuesday afternoon.

By the Special Commissioner:

Q. What date, please? A. The 29th—that we
would have to assign, that I couldn't get the money.

280 Q. Who told you you would have to assign? A. I told myself.

Q. Were you in communication with Mr. Flinsch?

A. Yes, I was in communication with Mr. Flinsch.

Q. Cable communication with Mr. Flinsch? A. Yes.

Q. And you asked Mr. Flinsch to try and arrange a loan on the other side for you. A. I did.

Q. When was that that you asked him to arrange a loan on the other side for you? A. It might have been on the—— I don't know the date it was to——

281 Q. Can't you tell? Haven't you got any cable? You must have cabled to him? A. Yes, but I can't say the date. I cabled him on the Sunday from Tuxedo; I know that.

The Special Commissioner: That would be the 27th.

Mr. Larkin: The 27th.

The Witness: The 27th.

Q. Did you keep a copy of that cable. A. No, I did not.

Q. Well, hadn't you cabled him before that? A. No; I did not cable. I sat down and wrote letters.

282 Q. Well, a letter wouldn't do you any good at that time, would it? You had to have money. A letter wouldn't do you any good? A. No, it wouldn't.

Q. As a matter of fact, wasn't he spending part of his time over there trying to get money for the house? A. I think so.

Q. Didn't he, in August, make an arrangement whereby you could increase your drawings on the Manchester house twenty thousand pounds? A. Yes, he did.

Q. After he left England, he went to Switzerland?

Mr. McLaughlin: I object, Mr. Referee. Mr. Flinsch is here in New York. Mr. Flinsch can be produced here at any of these hearings. 283

The Special Commissioner: We are not examining Mr. Flinsch.

Mr. McLaughlin: I object as incompetent, immaterial and irrelevant. The witness has evidently no knowledge of what Mr. Flinsch did on the other side of the water. It is a subject entirely beyond the personal knowledge of this witness.

Mr. Larkin: He has already testified to one thing that Flinsch did.

Mr. McLaughlin: Yes, under leading questions.

The Witness: He did go to Switzerland, but I wouldn't like to name the time. I don't know when he did. 284

Q. Do you know whether Mr. Flinsch has the cable that you sent to him from Tuxedo? A. That I cannot tell you.

Q. You can't tell that? A. No. If you ask him—

Q. What is that you said to Mr. Flinsch in your cable, as you remember now? A. I simply asked him to try and raise some money.

Q. What for?

Mr. McLaughlin: I object to this on the ground that the cable itself is the best evidence. 285

The Special Commissioner: He is not asking him what the contents of the cable are. He is asking him why he cabled him to raise some money.

Mr. Larkin: The question was answered.

Mr. McLaughlin: I move to strike out that answer, if it was. I object to that question on the ground that it is not proper. It is strictly improper for Mr. Larkin to examine his own witness as to the contents of a cable without producing the cable or showing that it is lost, or anything, for the manifest purpose— I will not say for the manifest purpose—

286 The Special Commissioner: The question was put and answered and you made no objection. It is not necessary in every case to produce everything that was referred to.

Q. What did you cable him for? Why did you cable him? A. Well, because money here was so tight, so high, and it was very hard to get.

Q. You knew that you had to have money or you would go up, didn't you? A. Well, but I might have got money; and Gillett had money, too.

Q. Did you convey that idea to Mr. Flinsch in your cable? A. I never convey ideas in a cable, because I always make cables concise and short.

287 Q. Now, you say you sent this cable on Sunday, did you? There had been no change on Sunday in the financial condition? A. Well, this—

Q. There was no stock market going on? A. It does not matter. The sentiment was worse on Sunday than it was on any day of the week.

Q. How did you get any sentiment at Tuxedo? A. Because so many financial people are out there.

Q. The situation was about the same on Saturday, wasn't it, as it was on Sunday? A. No.

Q. What change had taken place in your condition on Sunday which did not exist on Saturday? A. In my condition, nothing had changed.

288 Q. I am not asking you, you know, about your present condition. I suppose you meant the condition of Kessler & Company had not changed. A. Yes.

Q. Was there no change in the condition of Kessler & Company from Saturday to Sunday? A. Yes.

Q. The same condition prevailed on Friday, didn't it? A. On Friday?

Q. Yes? A. When was that—after the failure?

The Special Commissioner: No, the 25th.

The Witness: On Friday there was nothing.

Q. The condition was exactly the same as it was on Saturday and Sunday? A. No. On Friday I didn't have any idea of anything happening. 289

Q. Why, didn't you tell me that, down at your office on the 11th of November, that Friday you were very much worried? A. I might have been worried. Wouldn't you be if money was lending at 115%.

Q. And you were worried on Friday, the 25th? A. I was worried a good deal.

Q. And what came to pass you were fearful of on that day? What thing came to pass you were fearful of on that day, the 25th of October? A. I never thought it would have to happen on that day. 290

Q. Wasn't that the matter of your assignment, the thing that you were worried about on the 25th of October? A. No.

Q. What were you worried about—about Kessler & Company, of Manchester? A. No; I was worried about business in general.

Q. So that, although the banks were closing, as you know, right and left, uptown and in Brooklyn, and money could not be borrowed, still you were not worried about the house of Kessler & Company of New York? A. No.

Mr. McLaughlin: I object to that. He said he was. 291

By the Special Commissioner:

Q. Well, you were worried? A. I think everybody in the street was worried. Everybody in the street was worried, I think.

Q. Everybody in the street was worried, in general terms? A. I think so.

By Mr. Larkin:

Q. Do you remember particularly Friday, the 25th of October? A. No, I do not.

292 Q. Isn't it a day that you remember more distinctly than any other day in those two weeks? A. No, not necessarily.

Q. You don't remember the day you made the assignment any more than you recollect any other day? A. Yes; I remember that, of course.

Q. Now, your papers connected with the assignment were not drawn on the 30th of October, were they? (No answer.)

Q. You were consulting with your attorney, weren't you, before the 30th of October? A. Yes.

Q. Now, how long before—how many days before? A. The day before, the 29th.

293 Q. Well, now, are you quite sure about that? A. Yes.

Q. Who was your attorney? A. At that time, it was Mr. Taylor.

Q. Mr. Howard Taylor? A. Yes.

Q. Now, don't you remember that Howard Taylor, prior to that, went up to see Mr. Gillett? A. Yes; he went on the Monday to see Gillett.

Q. And on Monday he went alone to see Gillett, didn't he? A. Yes.

Q. So that you were not with him when Gillett was called on at that time—he went alone? A. He went alone.

294 Q. And you knew what he went for—to tell Mr. Gillett that an assignment would have to be made?

Mr. McLaughlin: I object to that.

The Special Commissioner: If he does not know he can say so.

A. I don't know.

Q. Hadn't you and Mr. Taylor discussed the necessity of seeing Mr. Gillett before an assignment was made? A. Well, of course, because Gillett was the monied man.

Q. Didn't Mr. Gillett go—— A. We intended to get the money from Gillett.

Q. Didn't Mr. Taylor go up to see about the assignment? A. Not about the consignment. He went to see Gillett to see if he could get any money out of him. 295

Q. Well, did you think that Mr. Taylor would be more apt to get money out of your partner than you would yourself? A. I don't know. Tuesday, wasn't it?

Q. Don't you remember that Mr. Taylor tried to see Mr. Morgan? A. I went to see Mr. Morgan, too. I don't know whether Mr. Taylor went to see Mr. Morgan.

Q. Didn't you both try to see Mr. Morgan? A. I tried to see Mr. Morgan. 296

Q. Mr. Kessler, just look at that paper (handing paper to witness) and, after you have looked at it, please state whether or not it was not prepared on Monday or Monday evening?

The Special Commissioner: What is that?

Mr. Larkin: It is the general assignment.

A. It was not made on the Monday, I don't think. On Monday? I am not sure it was not made on Monday.

Q. When do you say it was made—on Tuesday? A. It was made on Wednesday.

Q. Well, it had to be typewritten? A. Well, it doesn't take long to do that. 297

Q. Is your recollection that you went over to Mr. Taylor's office on Wednesday and stayed there until this was typewritten? A. No.

Q. Well, you and Mr. Taylor were in consultation together on Tuesday, and Mr. Taylor on Tuesday, as you say, went to see Mr. Gillett?

The Special Commissioner: He said Monday.

Q. He didn't get any money from Gillett? A. No.

Q. And thereupon you decided you would have to make an assignment? A. No, not thereupon.

298 Q. And on Tuesday you decided you would have to make an assignment? A. Because I understood that Gillett would come down on Tuesday morning, and he didn't come. He told Mr. Taylor so.

Q. Now, just turn to your book there and show me the dates of the drafts on Glynn, Mills, Curry & Company which would come due that you would have to cover. Just turn to that book. (The witness does so.)

Q. I want you to take the weeks beginning October 21st and 28th, and state what drafts were due in those two weeks.

(The witness examines book.)

299 Q. What have you got here (indicating)? October 11th, isn't it? A. You say "falling due."

Q. In the weeks beginning the 21st and 28th? A. Yes.

Q. Haven't you got those totalized at all? A. No.

Q. How are you able to state from this page that these obligations became payable on the weeks commencing October 21st and 28th? A. The steamer arrives on the Monday.

Q. Saturday's steamer of October 11th? A. Those bills would arrive before.

300 Q. On the 21st? A. Yes. Therefore, those bills would have to be paid on that date. On the 14th, received letter. Those bills would have to be paid about the 25th.

Q. All right. Now, I want you——. There are more of them, aren't there? A. Yes.

Q. Now, let me see your book. October 9th. In other words, the sales of exchange which you made on the 11th, in ordinary course would come with the Saturday's steamer, which was on the 12th? A. Yes.

Q. Now, I want you to add up, if you please, the total amount of these drafts which you had to meet on the arrival of the steamer and which would, in

the ordinary course, be presented to you in London 301
on the 21st. (The witness does so.)

Q. These are sight drafts, are they not? I don't want anything that is payable in sixty days; I want the sight drafts. A. You want from the 9th of October.

Q. Now, I show the account with Glynn, Mills, Curry & Company, folio 201 in foreign ledger, supplement, and ask you if you can state, having looked at it, the amount of money which you had to provide Glynn, Mills, Curry & Company in the week beginning the 28th of October. A. It must be around £60,000.

Q. As you recollect now, you had to cover about 302
sixty thousand pounds on Monday, the 28th of October, in London. A. No; not Monday—during the week.

Q. You mean to say you had to cover, as you recollect now, on Monday, the 28th of October? A. That is very hard to get in here. Mr. McLean can tell you that better than I can. I don't know.

Q. You say that Mr. McLean can tell what the condition was better than you can? A. I think so.

Q. Well, it is true, is it not, you had to cover acceptances payable in London on the 28th of October, had you not? A. I don't know whether the 28th or 29th—probably the 29th, because it may be 303
that the steamer was a fast steamer, and maybe we had to cover on the Saturday, and then the next steamer arriving would be Tuesday, the German boat.

Q. Now, as a matter of fact, wasn't it just because these drafts were becoming payable on the 28th and 29th that this assignment of yours was forced? A. Yes, and I had also a loan called.

Q. Who called the loan? A. The Central Trust Company.

Q. What was the amount of the loan? A.
\$100,000.

304 Q. When did they call it? A. They called it on the Friday, and then I said——

Q. What Friday? A. 25th of October.

Q. What did you do? A. I asked them to let it go over until the next week, which they did.

Q. So that, at the end of the week, you had a loan called and you had a large amount of money which had to be provided in cash for the 28th and 29th of October, Monday and Tuesday of the following week? A. The 29th. I wouldn't say the 28th, because I don't think I needed any.

Mr. McLaughlin: We object to that question on the ground that Mr. Larkin is embodying in a question—assuming a statement made by the witness
305 which the witness has not made; as putting the words into the mouth of the witness which he has not testified to.

The Special Commissioner: I don't know that he attempts to put that in the witness' mouth. Why don't you modify your question and ask him whether or not it was not a large amount of money, in addition to that to be met, to be provided in cash?

Mr. McLaughlin: That is perfectly proper.

The Witness: It would be in exchange.

By the Special Commissioner:
306

Q. You would have to either pay it in cash or in exchange. A. In exchange.

By Mr. Larkin:

Q. Why didn't you pay it in cash? Why did this condition make an assignment necessary? It is just as easy to pay it in exchange?

By the Special Commissioner:

Q. By exchange you mean funds, money? A. Yes.

By Mr. McLaughlin:

307

Q. You mean money? A. Yes.

By Mr. Larkin:

Q. You put up a lot of money in cash and you didn't have and couldn't get it—is that it? A. I suppose so.

Q. What time was it on the 25th of October that the Trust Company called that loan—in the morning or in the afternoon? A. I think it was the afternoon.

Q. Was it before or after you delivered these securities to Kessler & Company of Manchester? A. I don't know.

Q. You cannot remember whether it was before 308 or after? A. No.

Q. The calling of that loan, I mean? A. No.

Q. Mr. Henry Kessler was in the office on that day, wasn't he? A. I don't know. Yes, if that is the day he took the securities, yes.

Q. Well, do you remember his being there the day before—the 24th?

The Special Commissioner: That would be Thursday?

Mr. Larkin: Yes, Thursday.

The Witness: No.

Q. Do you remember his being there the day before? A. No; I don't remember what day he was there. 309

Q. Have you a present impression that he was there before—from October 22d down to and including October 25th? A. No; I don't think he was.

Q. But he says he was. A. Then he knows.

Mr. McLaughlin: I object to that.

The Special Commissioner: He has not said so in this proceeding.

Q. Mr. Henry Kessler has testified before Commissioner Alexander that he was present there

310 every day from October 22d down to October 25th. Now, in view of that statement— A. What is the good of asking me?

Q. I would like to have you corroborate it? A. I don't know; I can't tell.

By the Special Commissioner:

Q. If Mr. Henry Kessler has so testified, the question he asks you is, "Do you deny it?" A. I don't deny it. I don't watch every going and coming.

By Mr. Larkin:

311 Q. Did you think that Mr. Kessler had to be watched? A. No; I say I don't know.

Q. Wasn't he talking with you about business conditions? A. No.

Q. Didn't he talk about the general financial conditions? A. That he may have done; yes.

Q. Did he talk with you about the difficulty of getting money to meet the obligations of the house in London and elsewhere? A. No.

Q. Wasn't the peculiar feature of the financial conditions, the difficulty of getting money at that time—wasn't that the very essential feature of the work? A. Well, I suppose so; yes.

312 Q. Now, you mean to say that, although you talked about the general financial conditions, that you never touched upon the difficulty of borrowing money at that time in Wall Street? You mean to say that? A. I don't remember what I talked about.

Q. Well, as a matter of fact, the condition in Wall Street was well known to every member of your house—to McLean, McGee, Nestly and Bertie Kessler? A. Yes.

Q. Everyone there, every day, in the office? A. Yes.

Q. These people knew the obligations you had to meet? A. Yes. 313

Q. Everybody was trying to secure loans to tide you over? A. No, they were not.

Q. McGee did, didn't he? A. McGee? I don't think so.

Q. Well, didn't you say, in an early part of your examination to-day, that you tried to get loans and that Mr. McGee also tried to get loans? A. Not at that time, I didn't say McGee. I said Mr. McGee generally did attend to the getting loans. I don't think I asked him at all the other day.

Q. Well, you would, as a prudent man, having these large payments to meet on the 28th or 29th in London, try and arrange to meet those beforehand, wouldn't you? A. I did try. 314

Q. Now, are you quite sure that nobody else tried other than yourself? Didn't Mr. McGee try at first? A. No. I am not sure.

Q. Mr. McGee, in ordinary times, took care of the securities and made the loans, didn't he? A. Yes.

Q. And he had charge of the securities which were in your control, in your possession, did he not—Mr. McGee? A. Yes.

Q. And he would take those securities and go to a bank and endeavor to secure a loan on them? A. No. You don't go hauling around securities on a loan. You go and get the loan first and then send around the securities later on. 315

Q. But the way it was done—McGee knew how to do it and did it from time to time? A. Yes.

Q. Mr. McGee was aware of your failure to secure loans at that time, wasn't he? A. When is that, now, 28th, 29th, 30th?

Q. You had a loan called on the 25th by the same trust company? A. I had lots of loans called.

Q. I am not speaking about those loans. You

316 had a loan called at a time—on the 25th of October.

Mr. McLaughlin: I object to that.

The Special Commissioner: I think I will sustain the objection to that question.

Q. You had been notified by the Trust Company, Mr. Kessler, that you would have to take up their loan, weren't you? A. Yes.

Q. And you had secured an extension until Monday, I understand your testimony? A. I was notified that the bank would call the loan and asked them to extend it, and they said, "All right, let it
317 run," and I thought the Central Trust Company would probably do the same.

Q. Well, you had arranged with the Central Trust Company to have it go over on Monday? A. Yes.

Q. And naturally, having notice of the calling of the loan, did your best to get a loan to cover yourself? A. Yes.

Q. And you also endeavored to get money to meet these obligations in London? A. Yes.

Q. And McGee helped you, didn't he? A. I don't know whether he did or not on that day.

Q. Can you remember the day, now, that you went around trying to get a loan to the firm? Can't
318 you remember whether it was Friday? A. No.

Q. Didn't you try, the very day you received notice from the Trust Company, to make arrangements on the following week? A. Not until Monday.

Q. Well, now, did you wait until Monday to meet the obligations which were becoming due in London on Tuesday? A. Yes, I did wait until Monday.

Q. Well, now, Mr. Kessler, wasn't it very unusual for you to cable an urgent telegram to your partner over there on Sunday from Tuxedo, unless

it was that you had abandoned all hope of being 319
able to tide over the situation? A. No, because
up to the very last moment, I depended on Gillett.

Q. And was this due to any conversation you
had between Gillett and yourself? A. No.

Q. You mean to say that you depended upon a
man who you had not seen for weeks to talk busi-
ness with? A. He was always around; I saw him

Q. Were you talking business with him? A
Now and then.

Q. Did you tell him about the condition? A
Well, he knew that.

Q. Did you tell him about the necessity of your
business in having cash? A. I did, yes.

Q. And this was prior to the time that you went 320
up to the hotel to see him? A. That was in that
week; yes. I didn't bother him before that.

Mr. McLaughlin: I think the answer "Yes" is
that it was prior to that week, and the rest of
the answer is, "I didn't bother him until that
week." It is a clear misunderstanding on the part
of the witness as to the question. There is no
doubt about what the witness means there, but it
is clear that he testified—

Mr. Larkin: I will ask him a few other ques-
tions and try to clear it up.

Q. You expected assistance from Gillett, did 321
you? A. I did.

Q. I understand that you went up there on Mon-
day night to get assistance from him to meet an
obligation due in London on Tuesday. (No an-
swer.)

Q. Did you go up there on Monday night to ask
him to give the firm assistance to meet an obliga-
tion in London on Tuesday morning? Is that what
you went up there for? A. Not necessarily for
Tuesday morning—for a week hence—anything. I
went up to Mr. Gillett on the Monday, and—
Well, then, when I left, I thought he would come

- 322 down on the Tuesday morning and provide—we only needed about \$300,000—that would have pulled us through all right. I expected he would get it, and, if he had got it, it would have been a very easy matter for me to cable to Glynn, Mills, Curry & Company, “We are remitting”—something like that—“a day or two late.” Glynn would have accepted all those drafts.

By the Special Commissioner:

Had you laid the situation before Mr. Gillett prior to Monday, the 28th? A. No.

Q. You had not? A. No.

- 323 Q. You are quite confident you had had no general conversation with him about the needs of the firm or the situation? A. No.

Q. It was not till Monday? A. It was not till Monday.

Q. And your explanation, in answer to the question of counsel as to whether, on Monday, you expected to get relief from Mr. Gillett in time to meet the obligations on Tuesday, is that, if he had agreed to put up the money, you could, by cabling them, have saved the situation? A. Oh, yes, sir.

Q. That is it, is it? A. Yes.

- 324 By Mr. Larkin:

Q. In other words, you expected Gillett would borrow some money? A. Either borrow it or provide it. Gillett told me he was worth \$2,000,000.

Q. When did Gillett tell you that? A. When he joined the firm.

Q. How many years before this was that—about five or six years? A. About five or six years? Well, five or six years.

Q. Did you find any difference in the general conditions between those which existed five years ago and those which existed on the week of October 21, 1907? A. Naturally.

Q. Very serious? A. Naturally. If it had not been so, we would still have been all right. 325

Q. What was it that Mr. Gillett did at the office; what was his duty? A. Well, Mr. Gillett, when he came back from Europe, I wanted him to specially pay attention to two accounts. That was the Orleans Quarry account and the Pittsburgh & Westmoreland Railway.

Q. When did he return from abroad—what month? A. I think it was August; it may have been September.

Q. September, 1907? A. I couldn't tell the date.

Q. Well, was it August or September, 1907? A. August or September, yes. 326

Q. Did he come to the office at all after his return from abroad? A. Oh, yes, sir.

Q. Did he have locomotor ataxia when he returned from abroad? A. Yes, just about the same.

Q. Just about as much when he left as when he came back? A. Yes.

Q. Had he at any time given more attention to the office in past years than during the months after his return from abroad? A. Yes.

Q. Haven't you any book to which you can refer, any letter book to which you can refer, where you can show the dates that Mr. Gillett was present in the office, in the months of August, September and October, 1907? A. No. 327

Q. Did he ever write any letters? A. Not many.

Q. Did he dictate letters? A. Now and then.

Q. What did he do when he came down there? A. He would sit around; he didn't do very much.

Q. Did he ever borrow money from the firm? A. Well he drew money from the firm, and he also borrowed money once or twice.

Q. He drew money from the firm. Did he have his own account? A. Have his own account, just the same as we did.

Q. Now, tell me one single loan that Mr. Gillett

328 secured for the firm in the year 1907? A. Mr. Gillett was abroad in 1907.

Q. Then he never got a loan in 1907 for the firm?

A. You mean secured one for the firm?

Q. Secured one for the firm in 1907. A. No; I don't think he did.

Mr. McLaughlin: Is this material, Mr. Referee?

The Special Commissioner: It is bearing upon the creditability of the witness' testimony, that he relied upon Mr. Gillett to furnish money. That is the object of the testimony, as I understand it. I suppose that is within bounds.

329 Q. I understand your testimony, Mr. Kessler, to be that Mr. Gillett returned here in August or September, 1907? A. I think so.

Q. And he had locomotor ataxia? A. Yes.

Q. And lived at the Hotel Belmont, didn't he? A. Yes.

Q. That you had no business consultation with him of any moment in regard to the serious financial condition in which your firm was until Monday night of October 28th, when you called on him to get a loan, to meet a draft in London coming due on the next morning? A. No, not necessarily.

Q. Not necessarily what? A. Due on the next morning.

330 Q. Do you say now that there were no drafts due the next morning in London? A. It was during the week. I didn't know. There were sixty thousand pounds due, and whether it was Monday—it was not Monday—but Tuesday or Wednesday or Thursday—all divided up—

Q. You had some drafts to meet on Tuesday, didn't you? A. Yes.

By the Special Commissioner:

Q. Were there drafts due? A. During the week there was sixty thousand pounds due, but whether

it was Tuesday, Wednesday, Thursday or Friday— 331
it was all divided up——

By Mr. Larkin:

Q. Well, now, did you consider that Mr. Gillett had a better credit in Wall Street than the house of Kessler & Company? A. Well, I don't know.

Q. If you could not borrow against securities, how could Gillett borrow against securities? A. I could have got other securities from Gillett, probably.

Q. Did you ever see any other securities that Gillett ever had? A. Only before he became a partner.

Q. For five or six years before? A. Yes. 332

Q. He never put up any additional security? A. No.

Q. Did you ever ask him to? A. No.

Q. Well, in August, 1907, you were increasing your drawing accounts, weren't you, with foreign houses? A. I daresay.

Q. You increased your drawing accounts with the Manchester house by twenty thousand pounds? A. Yes.

Q. And you also endeavored to increase your drawing accounts with other houses, did you not? A. No; we decreased them.

Q. Well, now, what house was it that you decreased your drawing accounts with? A. I don't know. 333

Q. Then why do you say that if you don't know? A. Because I suppose that between January and the——

Q. Don't go into that. Why do you say that you decreased your drawing account if you don't know? A. Because I know that a great many accounts were cut down. Where we were drawing two hundred and fifty thousand, they were cut down to half, and where we had fifty cut down to twenty-five, and therefore it was all decreased.

334 Q. That condition required Kessler & Company to increase the amount of their cash capital or increase their drawing accounts elsewhere, did it not? A. Yes, or sell some securities.

Q. If you could sell them? A. Yes.

Q. Now, as a matter of fact, the security market had gone to pieces in the course of this year? A. Yes.

Q. And you could not sell any securities except at a great loss—isn't that so? A. Yes.

Q. And you were compelled to put in an additional amount of capital into your firm or increase your drawings elsewhere? A. Yes.

335 Q. Now, you increased your drawings with the Manchester house, didn't you? A. Yes.

Q. Couldn't sell your securities except at considerable loss, could you? A. No.

Q. And yet you waited until Monday, the 26th of October, 1907, before you asked Mr. Gillett to help the situation. Is that right? A. Well, I spoke to Gillett about it, but I never asked him to put up money until it was needed.

By the Special Commissioner:

Q. I understood you to say you didn't consult him before the 21st. A. I didn't consult him.

336 Q. You spoke to him about the situation? A. Yes.

Q. Now you tell us that is not the first talk with him about the situation? A. That I can't say.

Q. Well, prior to October 28th— A. Well, I really would not be able to say, because I don't remember the date at all.

Q. But you remember that? A. I told him that things looked pretty bad and everything.

Q. Now, as regards August and October, when was that? Was it in August or was it in September or was it in October? A. No, it would not have been before October, anyway.

Q. It was not before October? A. No. 337

Q. Well, was it in October? A. I don't know. I think it must have been October.

Q. Don't you know whether you wrote him at all prior to October 28th or talked with him at all about the situation? A. Not on the real situation of Kessler & Company, I don't think I did.

Q. What did you talk with him about? A. Of the general situation.

Q. That is, the general business situation? A. Yes.

Q. And what did you tell him? A. Well, I don't know. I would not remember what I told him at the time. I told him things were pretty bad, and 338 so on.

By Mr. Larkin:

Q. Did he ask you what that had to do with Kessler & Company? A. No.

Q. He, of course, did not appreciate the fact that Kessler & Company were interested in the serious financial condition, did he? A. I don't know.

Q. Your conversation with him simply was passing the time of day, telling what other people's condition was?

Mr. McLaughlin: I object to that.

The Special Commissioner: Objection overruled. 339

Q. You were passing the time of day? A. I don't know whether I told him about other people's conditions in general.

Q. What conditions did you tell him about? A. I don't remember.

Q. Did you tell him the Knickerbocker Trust Company had failed? (No answer.)

Q. Did you tell him that the Copper corner had busted in Wall Street? (No answer.)

Q. Do you remember a single thing you told him? A. The Knickerbocker had not failed.

340 Q. Had the copper corner busted? A. The copper metal had busted.

Q. Had the Thomas syndicate been thrown out of their banks at that time? A. No.

Q. When you say the copper metal had busted, what do you mean? You mean the lowest copper? A. When it dropped to 11 cents.

Q. After it had been up to what point? A. 27, 26.

Q. Did you tell him you had trouble borrowing money or that you had to have additional capital? A. No. "We ought to have more money," I said.

By the Special Commissioner:

341 Q. You mean by that you thought you ought to put more capital into the firm? A. Yes.

Q. Is that what you meant? A. Yes.

By Mr. Larkin:

Q. Did he ask you what you wanted the capital for? A. No.

Q. Well, you weren't very disturbed about the condition then, were you? A. No.

Q. There wasn't any reason apparent to him why he should put up any money, was there? A. Well, I don't know.

Q. Do you remember Saturday, October 26th?
342 A. Saturday, October 26th?

Q. Yes? A. Yes.

Q. Were you living in Tuxedo at that time? A. Yes, sir.

Q. And what time did you leave your office to go to Tuxedo? A. I took the 2.40 train.

Q. Did you leave anybody in the office, in charge of the office, after you left? A. Oh, I think there is always somebody in charge of the office there until four o'clock. I don't know.

Q. Now, you found, when you saw Mr. Gillett, that he was in touch with the financial conditions, didn't you? A. Yes, he was.

Q. How long did that conversation with him last? A. Oh, I couldn't tell; half an hour, perhaps. 343

Q. How long did your conversation last when you went over the general financial condition with him? A. Oh, no time. I think it was not more than half an hour.

Q. Where was it—at your office? A. The last time, I went to see him.

Q. No, I am not asking you about the last conversation. I am asking you about the conversation you said a minute ago you had about the general financial condition? A. Yes; that was at the office.

Q. Did you point out any special feature of the financial condition that was bad in your judgment? A. No; I think the chief thing was I spoke about Roosevelt, and that was the chief condition I found was wrong. 344

Q. Do you remember anything else except Roosevelt? A. I don't remember exactly what was said.

Q. Didn't it have anything to do with borrowing money? A. No.

Q. Well, it had something to do with the value of securities you were talking about. A. Yes; I may have talked to him about that.

Q. And the securities, as far as you are concerned, are valuable because upon the value of these securities depends the amount you can borrow against them, doesn't it? A. Naturally. 345

Q. You have not stated any bad feature that you told Mr. Gillett about yet. I want to hear what bad feature it was in the general situation? A. Oh, I don't know.

Q. Well, then, you wish to go on record now as saying there are two occasions when you spoke to Gillett about the firm's affairs? A. That is all.

Q. And only two? A. That is all that I know of.

Q. You don't wish to be understood as saying

346 there were not other occasions when you spoke to him? A. No; I say that is all I know of.

Q. Well, how do you stand? Do you wish to be understood as saying positively these are the only two occasions you spoke of, or you may have spoken on other occasions which you do not now know of?

A. I may have spoken on other occasions, but I don't think I did.

Mr. McLaughlin: Are you referring now to the fall of this year?

Mr. Larkin: Yes, I am.

347 Q. Did you ever have occasion to meet Mr. Gillett anywhere else than in the office or up at his residence? A. No.

Q. When Mr. McLean came to you and told you that these drafts were to be met in London in the week commencing October 28th, what did you say to him? A. Well, I said, "You will probably get the money."

Q. Was McLean familiar with the situation in Wall Street at that time? A. I suppose so.

Q. Now, who is the highest-priced man in your employ? A. He is.

Q. He was being paid \$10,000 a year? A. Yes.

Q. You considered his services valuable, did you not? A. Yes.

348 Q. And it was his business to follow these drafts and the date of payment? A. Yes.

Q. Now, you told him you hoped to be able to borrow the money, didn't you? A. Yes.

Q. Now, at that time he had some doubt as to whether you would or not, as you thought, on account of the condition—— A. Yes, I daresay he had.

Q. Now, Mr. McGee also had that same doubt on the subject that you had, had he not? A. I don't know; I didn't ask him.

Q. Well, McGee had gone off to try to get some loans? A. I don't think so, that day.

Q. I am speaking now of the week beginning 349
October 21st. A. Well, I couldn't tell; I don't
know.

Mr. McLaughlin: You have not been speaking of
the week beginning October 21st.

The Witness: I said in my——

Q. I am speaking of the week of October 21st.
A. I don't know whether Mr. McGee went and tried
to borrow any money.

Q. You know he didn't get any? A. I don't
know. I would have to look at the books.

Q. What books would you like to look at? A.
The loan book.

Q. Can't you state to the Referee now just how 350
many loans were secured in the last two weeks be-
ginning October 21st and 28th? How many loans
did you get? (No answer).

Q. You got one from Mr. Morgan, as I under-
stand it? A. That is all.

Q. That is the only loan you have got in those
two weeks, wasn't it? A. I think so.

Q. Now, you tried just as hard to get loans in
those two weeks as ever? A. I got some money
from the Merchants' Bank.

Q. Then you now state that there are two loans
that you got—one from Morgan & Company and
one from the Merchants' Bank? Is that right? A. 351
I really don't know. For the two weeks exclusive-
ly? I don't know.

Q. How are you going to leave that? Are you
going to say you got that loan from the Merchants'
Bank during those weeks or not? A. It was for
a small amount—the Merchants' Bank.

Q. You had a loan of \$190,000 from Morgan &
Company? A. Yes.

Q. Do you remember when you got that loan?
A. Yes; that was the last time.

Q. Was it on Wednesday or Thursday? A.
That I don't know. I would have to look that up.

352 Q. Do you remember the loan to the Central Trust Company? (No answer.)

Q. You mean the 29th or 30th of October when you say Wednesday or Thursday, if that is the date of the Morgan loan, don't you? A. Yes.

Q. Now, is there any book here that you can refresh your recollection with to show when it was that you got the next loan, any other loan, during those two weeks? A. There is no other book here. There is a book downstairs.

Q. Is your recollection now that you got the loan from the Merchants' National Bank in those two weeks? A. Yes; it is only a small one, though.

353 Q. What do you mean by a small one? A. Twenty or twenty-five thousand.

Q. Now, you tried, I think, to get loans in the two weeks as hard as you did at any other time? A. Not in the two weeks.

Q. Well, what week was it that you tried the hardest in? A. That was on the Monday and Tuesday.

Q. You mean the 28th and 29th of October? A. Yes.

Q. And you didn't try to get any loans earlier—to get any loans during the week beginning October 21st? A. No; because I didn't think it was necessary.

354 Q. Well, you didn't? A. No.

Q. Although you had these payments to make in London; the succeeding week you had been notified of the calling of the loan by the Central Trust Company, and you still postponed action until Monday or Tuesday, did you? A. Yes.

Q. Was it the fact that the money conditions were so unfavorable on the 24th and 25th of October—did that have any influence upon you in postponing your effort to obtain money? A. I really don't know.

Q. There is nothing in your office to show 355
whether you tried to get money on the 24th and
25th or 26th of October—any record? A. No.

Q. And your testimony is that either you tried
it, if it was tried, or Mr. McGee tried it? A. When
—the week before?

Q. Yes? A. No.

Q. McGee didn't try it? A. I don't know what
McGee did do.

Q. McGee usually did it, unless— It was Mc-
Gee's business usually to do it? A. Generally so.

Q. And you were only brought in when the
times were hard and the loans could not be se- 356
cured, and then you were brought in? A. Yes.

Q. And isn't that what happened in this case
exactly? A. Yes, in the week after. What you
are talking now is of the 21st?

Q. I am talking now of the 24th. A. No, I
didn't do anything.

Q. But your recollection is that McGee tried?
A. No, I don't think so.

Q. What did he do—just throw up his hands
and let you come in on the 28th? A. I don't know.

Q. Is there any record in the office to show what
McGee did? A. There is none.

Q. Your position was that your partner that was
here in this country was ill and difficult of access 357
—is that right? A. Yes.

Q. And that his visits to the office were infre-
quent? A. They were infrequent.

Q. That your other partner, Mr. Flinsch, was
abroad? A. Yes.

Q. And that he could not help you in the situa-
tion? A. Yes, he could.

Q. Well, did he? A. No, he did not.

Q. Had he advised you that he could not secure
money for you in reply to your cablegram? A.
That was only on the Sunday night.

358 Q. What was only on the Sunday night? A. That I received his message in Europe.

Q. Have you got that message? A. It is up at the house.

Q. Can you produce it? A. Yes, I think so.

The Special Commissioner: This is Sunday, the 27th?

Mr. Larkin: This is Sunday, the 27th; yes, sir.

Q. Well, he stated to you, I assume, by cable, that he had failed in securing the loan that you wanted—is that right? A. Yes.

359 Q. Now, you had been in communication with Flinsch before that? You knew generally what he was trying to do? You had been in communication with him all the time he had been abroad? A. Yes; but I didn't write him many letters.

Q. But he was over there with the purpose of getting some money for the firm's use, wasn't he?

By the Special Commissioner:

Q. You heretofore testified that you had written your partner while he was abroad about business affairs. I understood you to so testify earlier in this hearing, didn't you? And that besides the cablegrams you had had some communication with him by letter? A. Yes.

360

Mr. Larkin: I would like my last question repeated.

(Question repeated as follows: "But he was over there with the purpose of getting some money for the firm's use, wasn't he?")

The Witness: Yes, he was over there to sell that Daimler Company.

By the Special Commissioner:

Q. When did he go abroad, Mr. Kessler? A. He went away in June, I think it was.

Q. In June? A. Yes. He had pneumonia; he was very ill. 361

Q. He went partly for his health, then, didn't he? A. Yes.

Q. And with a view of selling the Daimler Motor, in which your firm had an interest? A. Yes.

Q. Was that a corporation with a stock or was it an invention merely? A. No; it was a corporation.

Q. You wished to form it? A. No, it had been running here. The only thing is, it burned down in March.

Q. And what was the purpose he had in view? A. Well, they have a lot of valuable patents. 362

Q. Was he going to sell the patents? A. Yes; there was going to be some arrangements made with the present house at Canstaft. The German company is called the Daimler Motor Gesellschaft, and, in fact, I got a cable saying he had made a very satisfactory arrangement with them, and when I got his letter I didn't see anything in it—

By Mr. Larkin:

Q. Now, Mr. Kessler, Mr. Flinsch had been ill with pneumonia in the fall of 1906. He went down South after he was ill with pneumonia and came back and attended to business, didn't he? A. Yes. 363

Q. So that, when he went away in June, it was really upon business; he had quite recovered his health? A. Well, I don't know.

Q. Well, he had been attending to business up to the time he left for Europe for months? A. Yes.

Q. So he went abroad in June. Now, you were in correspondence with him, either by letter or cable, while he was abroad? A. Yes.

Q. And it was his business to secure some money for the firm, if he could, wasn't it? A. Yes.

364 Q. Wasn't that what you were writing him about? A. Yes.

Q. Now, your condition was, then, that Mr. Flinsch was abroad, Mr. Gillett was ill and you were confronted by a very serious panic in Wall Street, weren't you? A. Yes.

Q. Now, during the time that this panic was going on—October 22d, 23, 24th, 25th and 26th—your uncle, Mr. Henry Kessler, was in the office from day to day—isn't that right? A. I don't know. You say he told you so, so I suppose he is right.

365 Q. Mr. Henry Kessler was one of the executors of your father's estate? A. Yes.

Q. And your father's estate had money invested in your house in New York—Kessler & Company? A. No.

Q. Did not? A. Kessler & Company invested?

Q. Well, it had capital invested?

The Special Commissioner: You mean at the time of the death. You stated you had borrowed money of the estate?

The Witness: Yes, but not invested.

366 Q. The estate had loaned to you personally ninety or ninety-five thousand dollars? A. No, \$78,000, personally.

By the Special Commissioner:

Q. That was a loan to you, and you had to use it, put it into the business—is that it? A. I loaned part of it—I loaned to Mr. Flinsch.

Q. To Mr. Flinsch? A. Yes.

Q. Not to the firm? A. No; but he, in turn, used it in the business.

Q. You had no other business but this banking business of Kessler & Company? A. No.

Q. Now, this was what you were doing exclusively—this banking business? A. Yes.

Q. Elsewhere, were you doing anything else? A. 367
No.

Q. Then your sole business was this banking
business of Kessler & Company in New York? A.
Yes.

Q. Now, if that business failed, you would fail,
wouldn't you? A. Yes.

Recess until 2 P. M.

AFTER RECESS.

ALFRED KESSLER (direct-examination resumed).

368

By Mr. Larkin:

Q. You wrote to Henry Kessler inquiring when
he was to return from Atlantic City to New York—
do you remember that? A. Yes, sir.

Q. I asked whether you made a copy of that let-
ter or not? A. No, I did not.

Q. Did you write it from the office? A. I prob-
ably wrote it from the office.

Q. You kept personal letter books, didn't you?
A. Yes; but I didn't copy those letters unless there
was some business transaction.

Q. Certain business transactions you kept in
what you call your personal letter books, did you?
A. Yes.

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Q. And that letter is not copied in that personal
letter book? A. No.

Q. Do you remember when you wrote it? A. No.

Q. You do remember that you wrote it to him at
Atlantic City, do you. A. Yes, but I don't remem-
ber what date I wrote it.

Q. Do you remember how near it was to the 21st?
Was it the last of the preceding week? A. No; I
couldn't tell.

Q. What was it that you wanted to see him
about? A. Nothing special.

370 Q. Just inquired as to when he was coming back? A. Yes.

Q. Do you remember how soon it was after you wrote that letter that he did come back? A. He came back three days later, I think.

Q. Three days later? A. Yes.

Q. Well, we assume you wrote the letter, then, on Friday of the week preceding? A. It would be on Friday—Friday evening, probably.

Q. Because he returns to the office, as he states, on the 22d of October? A. Yes.

Q. Now, when he came to the office— A. Not the 22d of October.

371 Q. Yes, he came to the office on the 22d. He came to New York on the evening of the 21st. Your recollection is three days, perhaps, before he came to the office. Now, without recollecting the dates, I understand that you do remember seeing him about your office prior to the time the securities were turned over to him?

The Special Commissioner: On that day, you mean?

Mr. Larkin: On the 25th of October.

The Witness: I saw him on the 6th or 7th.

Q. 6th or 7th of October? A. Yes.

372 Q. He went away, and—— A. Then he went to Philadelphia and from there to Atlantic City.

Q. And then you wrote him at Atlantic City, and about three days—— A. I wrote to him once or twice in Philadelphia, I think.

Q. Did you keep copies of any of those letters? A. No.

Q. You asked him when he was going to come back? A. I really don't know what I wrote—something about hotels, I think, more than anything.

Q. Now, you do recollect when he came to New York about the 22d of October, and from day to day you saw him in the office? A. Yes.

Q. And you saw him about the office from time 373
to time? A. Yes.

Q. And talking with various people in the office?
A. Yes.

Q. Now, won't you state, Mr. Kessler, what was
done by you and by Mr. Henry Kessler on the 25th
of October? A. Nothing was done by me.

Q. Nothing was done by you? A. No.

Q. Well, what was done by him? A. Was that
the date that Mr. Kessler took the securities?

Q. Yes. A. They were his and so— They
were his own.

Mr. Larkin: I move to strike that answer out.

The Witness: I am trying to explain, so that you 374
will know all about it.

The Special Commissioner: Yes, strike it out.

Q. I want to know whether you suggested to him
or he suggested to you about taking the securities?

A. He suggested to me.

Q. He suggested to you? A. Yes.

Q. What did you say? A. I said, "All right;
they are yours; do what you like."

Q. Did he say why he suggested taking them?
A. He being advised by his lawyers.

Q. Did he state who his lawyers were? A. At
that moment? I don't think so; no.

Q. You knew afterwards that it was Mr. Mc- 375
Laughlin? A. That is, later.

Q. Now, you didn't go to the safe deposit vault,
did you? A. No.

Q. Who went to the safe deposit vaults to get
these securities? A. I don't know. I think it was
Bertie Kessler.

Q. Who had access to the vaults? A. Who did?

Q. He had access to the vaults? A. He had ac-
cess to the vaults. He used to go every morning to
the vaults and get the securities out and put them
back at night.

376 Q. You told Bertie Kessler to get the securities out? A. No; I didn't tell him anything.

Q. Did you state to Mr. Henry Kessler there, "Why, he could have them," or words to that effect? A. Yes.

Q. Then, as I understand, Mr. Henry Kessler went to Mr. Bertie Kessler and went with him to the safe deposit vaults? A. That is what I understand.

Q. And your recollection now is that you did not tell him (Bertie Kessler) to take the securities at all? A. No; I don't think so.

377 Q. And you didn't tell anybody else—either Mr. McLean or McGee or anybody—to go to the vaults and take the securities? A. No.

Q. Now, that vault was in the North American Safe Deposit Company? A. In the name of Kessler & Company.

Q. Yes? A. Yes.

Q. And the only people who had access were Bertie Kessler and yourself? A. And Flinsch, myself and McGee, McLean and Bertie.

Q. What kind of a vault was this in which your securities were kept? A. It was a regular safe deposit vault.

378 Q. Well, is it a regular safe in the vault—one of the large boxes? A. One of the big ones.

Q. About how big was it? A. I don't know the exact measurement. It held a good lot of stuff.

Q. And in that vault you kept all the securities? A. Yes, sir. Not all the securities, because we had another in the National Safe Deposit; we had another vault.

Q. What did you keep in the National Safe Deposit? A. We kept those securities, as a rule where we only had to cut off the coupons once a month, or monthly coupons; the ones that we didn't want every day, don't you know.

Q. And the securities which you did need every

day you kept in the North American? A. But then 379
the vault in the North American was a very large
one. We had a tremendous lot of those Brewery
bonds in there. They took a great deal of room.

Q. So you went to that vault every day to get out
the securities that you might need in the course of
the day? A. Well, the securities, as a rule, were
in a bag. Not a bag—a sort of leather thing—and
this thing was taken in and out every day.

Q. You mean this leather—

By the Special Commissioner:

Q. Sort of a trunk, wasn't it? A. Yes.

Q. Such as you see people going around the 380
street with—bank messengers, and so forth? A.
Yes.

By Mr. Larkin:

Q. Now, did you make any protest at all to Mr.
Kessler when he said he was going to take those se-
curities away? A. No.

Q. You were willing to let him have them? A.
Yes.

Q. Did he come back to the office with these se-
curities afterwards? A. That I couldn't say.

Q. You remember that he gave a receipt of some
kind or there was a list of securities prepared? A. 381
Well, he had a list of the securities, yes.

Q. There was a typewritten list of the securities,
which he checked off—do you remember that? A.
No, I don't remember that.

Q. Do you remember who prepared the typewrit-
ten list of the securities? A. No, I couldn't tell
you.

Q. You didn't give any instructions to prepare
such a list, did you? A. No, I don't think so.

Q. These securities, or others of a similar kind,
had been in this vault since 1903, June, hadn't
they? A. Yes.

382 Q. Except such as you had taken out from time to time and sold? A. Yes. Some of them were in all the time and others were being changed.

Q. Now, during the same period, various members of the Manchester house have been in this country, have they not? A. Yes. My brother was here a year ago.

Q. And anyone else beside your brother? A. No; I don't think so.

Q. And do you remember Mr. Youatt being here? A. No. Mr. Youatt?

Q. He was here? A. Yes.

383 Q. And he examined these securities? A. That is so.

Q. And do you remember the occasion of his examination of them? A. I don't remember the occasion.

Q. Do you remember the occasion of his examination of them? A. He simply was over here, and I think he had a letter of introduction from my brother saying that he was his lawyer, or something, accountant, and he wanted to just check off the securities.

Q. Did he go to the safe deposit vault and check them off? A. Yes; I think he did.

Q. You didn't go with him, did you? A. No.

384 Now, did anyone else come over here other than your brother, Mr. Youatt——

The Special Commissioner: Have you fixed the date?

Mr. Larkin: I can fix it.

Mr. McLaughlin: It is fixed in the correspondence which we are going to stipulate in.

By the Special Commissioner:

Q. What time was that that Mr. Youatt was here, do you recollect? A. One or two years ago—two years ago.

By Mr. Larkin:

385

Q. At the time these securities were handed over by Bertie Kessler to Mr. Henry Kessler, he did not give you any check or any money or anything of that kind, did he? A. No.

Q. He didn't give you any obligation of the Manchester house, of any kind? A. No.

Q. Any drafts or bills or make any agreement of any kind with you. A. No.

Mr. McLaughlin: You mean with him personally?

Mr. Larkin: With the house of Kessler & Company.

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Mr. McLaughlin: You mean that Henry Kessler did not personally, or you mean Kessler, Limited?

Q. Henry Kessler is the managing director, is he not, of Kessler & Company, Limited? A. Yes.

Q. When I say "he," I mean he as representing Kessler & Company, Limited, of Manchester, as you understand? A. Yes.

Q. So that neither he, as representing that house, or individually, gave you any money or acceptance for the transfer of those securities to him at the time? A. No.

Q. Now, do you know what Mr. Henry Kessler did with the securities afterwards? A. I did not know at the time. I heard since that he deposited in another safe—separate safe.

387

Q. In the same safe deposit company's vaults? A. Well, I don't know.

Q. You don't know? A. No.

Q. Now, the house of Kessler & Company have representatives here, have they not, in the Cable Building? A. Yes.

Q. They have an office here? A. They have an office here.

Q. And that office is at the Cable Building, on Broadway, is it not? A. Yes.

388 Q. And how long has that office been established here? A. That I can't tell. Probably ever since we went in the banking business.

Q. Did you state—if you did I have forgotten—when your brother was over here—what year? A. He was over here last year, in October or November; somewhere around there.

Q. About a year ago? A. Yes.

Q. How long did he stay? A. Oh, I think he stayed six weeks.

Q. Did he come down to your office from time to time? A. Yes, but not often.

389 Q. Did he talk with you about business affairs at all? A. Well, he may have done so. I don't remember very much about it.

Q. Other than the fact that Mr. Henry Kessler said that his attorney advised him to take these securities, there was no other special conversation at the time, was there? A. No.

Q. You didn't ask him any special questions? A. No, sir.

Q. And he didn't volunteer anything further than that? A. Nothing.

390 Q. Of course, you knew, I suppose that, if these securities were taken—that the general creditors of the estate would be—dividends would be depreciated by the amount of those securities, did you not?

Mr. McLaughlin: I object to that as an improper question; no bankruptcy pending at that time.

The Special Commissioner: I think your question is rather objectionable in form. I will sustain the objection.

Mr. Larkin: Well, I will withdraw the question.

The Special Commissioner: What is the history of these securities?

Mr. Larkin: These special securities?

Mr. McLaughlin: They are all traced out in this 391
correspondence, from June, 1903.

The Special Commissioner: There is no question
but what the legal title was in Kessler & Company
of New York?

Mr. McLaughlin: Well, I——

The Special Commissioner: They were their se-
curities in the first instance?

Mr. McLaughlin: Yes.

The Special Commissioner: And then you claim
that, as early as 1903, they were pledged—or, at
least, that there was an agreement between the par-
ties that they should be secured as against their
drafts, don't you?

392

Mr. McLaughlin: Yes.

The Special Commissioner: As early as 1903?

Mr. McLaughlin: Yes.

Q. Until Mr. Kessler told you—Mr. Henry Kess-
ler told you—that he had consulted an attorney
on the 25th of October, did you know that he was
in consultation with an attorney? A. I didn't
know anything about it.

Q. He didn't ask you to recommend him to an
attorney? A. No.

Q. Mr. Henry Kessler, as you know, has been ac-
tively in business for a great many years, has he
not? A. Yes, active.

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Q. Didn't you think that his advice during the
week of October 21st would be valuable advice for
you to have as to the management of your busi-
ness?

Mr. McLaughlin: I object to that as incompetent,
immaterial and irrelevant.

The Special Commissioner: Now, in that con-
nection——

The Witness: I don't think so, because he has
never been in business in this country.

Q. You didn't think——

394 By the Special Commissioner:

Q. It is not a question of what your opinion is now, but the question is to get at the attitude of your mind at this time there in October. I understand that you did not? A. No, I did not.

By Mr. Larkin:

Q. Mr. Flinsch, your active associate in business, was abroad, as you know, and your other partner was ill, and you were unable to reach him. In a case of this kind, did you have anyone that you could turn to for advice? A. No; I did not have anyone.

395 Q. You didn't have anybody? A. No.

Q. And you didn't have any conversation with your uncle as to what his views were on the subject.

Mr. Seymour: Well, the relationship seems to be somewhat confused.

Q. What is the technical relationship between you and Henry Kessler? A. Second cousin.

Mr. Larkin: What was the last question?

(Question repeated as follows: "And you didn't have any conversation with your uncle as to what his views were on the subject?")

396

A. No.

Q. Did you, when you cabled Mr. Flinsch, indicate to him the perilous condition of affairs as you saw them on that Sunday, the 27th of October? A. No; I sent him a very short cable.

Q. Did you indicate to him that, unless you succeeded in borrowing money, you would have to make an assignment?

Mr. McLaughlin: I object to this, Mr. Referee, unless the cable should be produced here, if they have it.

Mr. Larkin: Well, I would be very glad to pro-

duce it, but I cannot. I don't know whether he has 397
got it. He may have destroyed it.

Mr. McLaughlin: I object to the question. It is not the best evidence. The best evidence is the cable itself, and it should be produced here; and, furthermore, it is not material or relevant to the issues in this case, because it is subsequent to the 25th day of October, 1907.

The Special Commissioner: Subsequent to the 25th?

Mr. McLaughlin: Yes.

The Special Commissioner: The importance of that testimony would be this—that if he was in that frame of mind, he must have known at that time 398
he was in that desperate condition——

Mr. McLaughlin: Can Mr. Larkin take a witness here, where there is no jury, before a referee, and in the informal manner we are proceeding—can he take his own witness and proceed to ask him about the contents of a certain paper, which he sent nearly a month ago—and that is the third question in regard to the contents of that paper and then ask him to produce that paper and perhaps assail the credibility of his own witness? I submit, Mr. Referee, that he has got to produce the paper first.

The Special Commissioner: I don't agree with you as to that. It is not every paper that is referred to in the course of a witness' examination that has got to be produced. There are a great many papers relating to a collateral matter that do not have to be produced. The witness can speak about them. 399

Now, about the relevancy of it, that is another view. You state it is not relevant. Why do you say it is not relevant?

Mr. McLaughlin: For the reason that it is subsequent to the date that we took possession, on the 25th of October. It has no bearing upon any issue

400 in this case, when issues are framed. We have not yet received the petition.

The Special Commissioner: What do you say to that, Mr. Larkin? Supposing you can show that on the 27th of October he came to the conclusion that he could not keep up? You cannot reason back and say that, because on the 27th he was going to fail, he thought he was going to fail on the 25th?

Mr. Larkin: I am going to show he was just as insolvent on the 28th as on the 30th. I will show by the books.

401 The Special Commissioner: Show that first; I will sustain the objection at present, and you may have an exception.

Q. Do you know whether the cable that you sent to Mr. Flinsch is preserved by him—whether he has it or not? A. Oh, yes; I think so.

By the Special Commissioner:

Q. You don't know anything about it? A. No; I say I should think so.

Q. Well, when Mr. Flinsch came back, you had a talk with him, didn't you?

Mr. McLaughlin: The same objection as before.

The Special Commissioner: I will allow that.

Mr. McLaughlin: Exception.

402

A. What about?

By the Special Commissioner:

Q. Well, did you have any talk with him when he came back? A. He only came back—— He came back—— We failed on the Wednesday. He came back on the following Tuesday.

By Mr. Larkin:

Q. When he came back on the following Tuesday, did you have a talk with him? A. Well, naturally we had a talk.

Q. Did he tell you what he did on the other side toward trying to raise money. A. No. 403

Q. Well, did you ask him what he did? A. No.

Q. Did you ask him whether he received cables from you or did he say anything? A. No. He got my cable, because, you see, he answered my cable.

Q. Where is the answer that you received to that cable? A. It is up at the house.

Q. Can you produce it for the next hearing? A. Yes.

Q. Can you tell when your books were last balanced, Mr. Kessler? A. Yes; they were balanced at the end of last year. We only close the books once a year. 404

By the Special Commissioner:

Q. You mean a balance sheet? A. Yes.

Q. I suppose you had trial balances; bookkeepers do it from time to time? A. Yes.

By Mr. Larkin:

Q. Who had charge of the books? Which bookkeeper was head bookkeeper, if any? A. Mr. Brettschneider.

By the Special Commissioner:

Q. They you say he had two assistants? A. He had two assistants. 405

Q. What were their names? A. One was Herkel. I can't tell you what the other fellow's name was.

By Mr. Larkin:

Q. Mr. Kessler, was there any substantial change between the 30th of October, 1907, and the 25th of October, 1907? A. Yes; there was a substantial change.

Q. In your financial condition? A. Yes, I suppose there was. Stocks had gone down another ten or fifteen points, and bonds had dropped ten points.

406 Q. Well, can you specify any stock that you were interested in at that time that had dropped ten points? A. Well, I don't know that I can. Lead was one. Reduction was another. Oh, I couldn't tell exactly, because I haven't got the things in front of me, nor have I got the prices of certain days.

By the Special Commissioner :

Q. What is that—United States or National Lead? A. National Lead.

407 The Special Commissioner : Will you ask him to look at the balance sheet—whether it was entered upon any book or was it preserved—

The Witness : The balance sheet of December 1st, 1906? Yes.

The Special Commissioner : December 31st?

The Witness : December 31st.

The Special Commissioner : Has the balance sheet been preserved?

The Witness : Oh, yes.

The Special Commissioner : Is it entered in some book?

The Witness : Entered in the private book.

408 The Special Commissioner : The Receiver has that book?

The Witness : Yes.

The Special Commissioner : Well, you knew of that balance sheet at the time it was made?

The Witness : Oh, yes.

By Mr. Larkin :

Q. Now, those balance sheets were in the private ledger, were they not—entered in the private ledger? A. Private book.

Q. As a matter of fact, the balance sheets did not appear in the regular business books of the house?

A. No; only the balances of the day, of our other— 409
the balances of the creditors.

By the Special Commissioner:

But these were entered in a private book, which
you called— A. Private book.

Q. Well, it is now in the hands of the Receiver?

A. It is now in the hands of the Receiver.

By Mr. Larkin:

Q. Do you remember borrowing from Morgan &
Company on the 30th of October? A. That was
really almost simply taking the loans away from
the City Bank and the Mechanics' Bank. 410

Q. What you did was to pay off two loans—one
to the National City Bank and the other to the
Mechanics' Bank—and you transferred the securi-
ties from the National City Bank and the Mechan-
ics' Bank to Morgan? A. Yes.

Q. That is all of the transaction.

By the Special Commissioner:

Q. After you got the money Morgan advanced,
you paid off the City Bank and the other bank, did
you not? A. Yes.

Q. Morgan would not sell out the securities, he
said, whereas I think the City and the Mechanics'
would? A. Yes. 411

Q. That is, you apprehended they would do that?
A. Yes.

Q. This was not done after your assignment, was
it? A. Before the assignment.

By Mr. Larkin:

Q. This transaction appears to have been before
October 30th. Did you arrange for it on the morn-
ing of October 30th or of the day before—do you re-
member? Did you arrange with Morgan & Com-

412 pany for the loan on the 29th? A. I went to Morgan on the afternoon of Tuesday, I think it was, and I asked him if he could help me. He said he did not see how he could unless he could take over loans. He said, "I will buy your exchange."

Q. Well, he took over the loans? A. Yes.

Q. Did he buy any exchange? A. He bought some exchange that day. Afterwards he called up, or, rather, his partner called up, and said, "Will that exchange be all right?" And I said, "Well, that depends on Mr. Morgan—on Mr. Gillett, if he will give me money." That was on Tuesday night.

413 Q. What did Morgan do then? A. Morgan's partner sent back the exchange.

Q. What was the amount of the exchange? A. I think it was five thousand pounds.

Q. Upon whom was it drawn? A. All our demand exchange is on Glynn, Mills, Curry & Company.

Q. When did you get notice from the National City Bank calling your loan? A. I didn't get any.

Q. You were fearful that the National City Bank would call or sell your securities, and you, as a provision against that, arranged with Morgan to take them over? A. Yes.

414 Q. And does the same answer apply to the Mechanics' National Bank? A. Yes.

Q. They had not called? A. They had not called; no.

Q. Now, how about the Central Trust Company? That loan was paid off on the 26th? A. That loan was paid off on Monday.

Q. That was the 28th? A. 28th.

Q. Well, what became of the securities which secured that loan? A. I sold some.

Q. That day? A. No; I sold some on the Saturday.

Q. What became of the balance? A. The balance—Sexton has got them.

Mr. McLaughlin: Sexton is the Receiver. 415

Q. Now, you borrowed \$20,000 from the Merchants' National Bank on the 28th of October? A. Yes.

Q. Was that all you asked for? A. No; I asked for more, but I only got that twenty thousand.

Q. What was that—a demand loan? A. No; it was discounting a note, practically.

Q. Whose note? A. Hegemeyer.

Q. Do you know when that note is payable—when it becomes due? A. It will not become due—I forget whether it is a three or four months' note.

Q. Do you remember borrowing from the Merchants' National Bank on the 10th of October, \$45,000? A. On the 10th of October? No, I don't remember. 416

Q. You didn't have anything to do personally with that? A. No.

Q. Well, if you did not, I presume Mr. McGee did not? A. Probably. What was it on?

Q. It doesn't say. It say, "Merchants' National Bank, \$45,000."

Q. Mr. Kessler, do you remember whether or not the firm owned any Lead? A. I owned some Lead. I don't know whether the firm did.

Q. What you personally owned had nothing to do with the firm, had it? A. Well, yes. I used my stock as collateral for the firm. 417

Q. You had your own account, trading account, with the firm, didn't you? A. Yes.

Q. You would borrow money from the firm in your trading? A. We were allowed each to borrow to the extent of \$10,000.

Q. And, in connection with that borrowing, you put up what securities you had—Lead or whatever it happened to be? A. Yes.

Q. Now, therefore, you don't wish to be understood as saying that the depreciation in Lead had any effect upon the house of Kessler? A. No.

418 Q. You do not? A. Well, I say Lead, perhaps, had not, but I say a lot of the stocks went down. I couldn't name the exact stocks. You asked me what stocks went down.

Q. The letters, Mr. Kessler, that passed between your house and Manchester were copied in what book? A. My private letters?

Q. No. I am asking about the business correspondence between— A. They went through the regular routine business, the same as any other.

Q. Well, there was some correspondence from time to time passing between Manchester and New
419 York relating to certain securities—do you remember that? A. Those are in my private book and not written by the office—by Kessler & Company. They were written, as a rule, by P. W. Kessler, who looked after that. You have the copies of those. In fact, you have all the letters that Mr. P. W. Kessler wrote.

Q. Well, how do you know that? A. Because you took them away from me.

Q. Took what away from you? A. The letters; and they were never returned, so I suppose you have still got them.

Q. Did I take them away from you? What letters? A. Yes, you or Mr. Macfarlane.
420

Q. Now, how many books? (No answer.)

Q. So you think I have them or Macfarlane? A. I haven't them, I know that.

Q. How many of those personal letter books were there? A. I only had two. I only had one which was in use.

Q. You had two altogether? A. Yes.

Q. And in these two books all the correspondence relating to these securities which passed between your house and the Manchester house—went through these two books. A. All my correspondence would go in that copying book.

Q. Yes? A. Their correspondence—well, I didn't 421
file it. Now and then it was filed; now and then
it was not.

Q. But all the letters which you wrote went
through those books? A. Yes.

Q. Those books are now in existence, are they?
A. Yes.

Q. Why was it that you didn't want this cor-
respondence to appear in the regular letter books
of the house? A. Well, I don't know. Because
either the clerks who are supposed to look after that
neglected it and no one else was concerned in it.

Q. Have you any other books in your office in
which are named the prices of securities from day 422
to day? A. No.

Q. You have nothing—no record in your books
to show what the value of securities were at any
special time? A. No.

Q. Of course, for such securities as are listed
on the Stock Exchange, you relied upon the sales
of the Stock Exchange to give you the value, did
you not? A. Of quotations? Now and then—

Q. Now, a great many of the securities you held
are not listed on the Stock Exchange, are they?
A. No; a great many were not on the Stock Ex-
change.

Q. Now, how did you get the quotations for such 423
securities as are not listed on the Stock Exchange?

A. Well, you can get a quotation very often, except
in good deal—

The Special Commissioner: Now, can't you ar-
range about that? Can't you arrange to get the
stock returns for them, you know, and you can
run it right along from such date as you choose
down. Then, if there are securities which are un-
listed, you will have to get some other information,
or, if they are on the Stock Exchange—

Mr. Larkin: Yes, we can do that.

424 Q. Now, Mr. Kessler, as a matter of fact, I suppose, so far as the quotations for the securities which are unlisted on the Stock Exchange are concerned, about in the week of October 21st and the week of October 28th, there practically was no quotation? A. Oh, no.

Q. There was a quotation? A. No, there was not.

Q. That is what I understand you to say is that there was practically no quotation and these securities you had were unsaleable? A. Yes.

425 The Special Commissioner: Some of the securities he had were unsaleable. Can't be all, because he has already stated he has sold some.

Q. I mean those securities which were unlisted on the Stock Exchange. You mean, for instance, that you have sold some securities which are part of the loan which was taken up to the Central Trust. Those Central Trust loans were based upon Stock Exchange collateral? A. No, not always; some outside securities.

Q. What you sold were Stock Exchange quotations? A. No; sold some Brewery bonds at 60. It was a very poor price for 6% bonds, but I sold some.

426 Q. Well, as a general rule, then, in dealing with securities which are not listed—the conditions in the weeks of October 21st and 28th did away with any market for them, practically, isn't that right? A. That is right.

Q. And the same condition existed right up to the time, after the time, of your failure, did it not?

The Special Commissioner: From what period?

Mr. Larkin: Beginning with the week of October 21st.

The Special Commissioner: Down to the 30th?

Mr. Larkin: Yes.

Q. I understand you to say that is correct. Is that right? A. Yes. 427

Q. Now, as a matter of fact, you had quite a lot of these securities of that class? A. Yes.

Q. Special securities? A. Yes.

Q. Unlisted on the Stock Exchange? A. Yes.

Q. The result of syndicate operations, and so on? A. Yes.

Q. And all of these you found to be practically unsalable and very difficult to borrow on, did you not? A. Yes, that is right.

Q. And that was, perhaps, one reason why you could not negotiate loans with which to take care of the obligations which were coming due in London on the week commencing the 28th? A. Yes; I think, in fact— 428

Q. If you had had better collateral, you might have pulled through? A. Might have pulled through.

Q. Since the adjournment, Mr. Kessler, you have not found out anything more about the amounts that were payable in London during the week commencing October 28th? A. No. I didn't go down stairs; simply went and got some lunch.

Q. Do you know that the amount payable between October 11th and October 25th to Glynn, Mills, Curry & Company was \$1,107,000? A. No. Well, I daresay that is not very big. We have done exchange at the rate of three million twice a week. That is six million. 429

Q. You weren't doing that just now, were you? A. Not lately; no.

Q. Now, these securities which you had, and which were unlisted, were securities which you had carried for about how many years? A. Oh, I don't know. Some of them one year and some two, some of them three.

The Special Commissioner: You mean all? You mean simply they had owned?

430 Mr. Larkin: They had owned, had not sold.

Q. Some of these securities, I suppose, you acquired by reason of subscribing to them when they came out originally—is that right? A. Now and then, yes. Syndicates and so on, and lately, of course, every syndicate went wrong.

Q. And these syndicates went wrong and left you with these various securities? A. Yes.

Q. Now, some of these I think you said you held for as long as two years, three years? A. And some longer.

Q. And waiting for an opportunity to sell them? A. Yes.

431 Q. So that really the securities which you acquired in that way you obtained at a price which was unprofitable to sell during the past two or three years? A. Yes.

Q. That you could not sell without making a loss? A. Yes.

Q. You held onto them hoping that it would change and you would be able to dispose of them at some proper price? A. Yes.

Q. Is that right? A. May I make just a remark. For instance, the United Breweries Company was just going to begin to pay dividends on the preferred stock, when all at once in Chicago they went and put the liquor license double. Then, instead of paying—— We had to use the money for helping the people, the saloon men, to pay the license, and that—— Now, all at once, the Breweries Company is beginning to go ahead again, and it looks as though next year they might be able to pay a dividend on the preferred stock. I can't tell; they may get another whack. If they can pay on the preferred stock, then the bonds would be very saleable.

432

Q. How long have you held those bonds? A. Ever since Flinsch came into the firm.

Q. Did the bonds come with Flinsch? A. Well,

they didn't come with him, but that was the first 433
negotiation, which proved a very rotten affair.

By the Special Commissioner:

Q. How many of those bonds did you have at
the time of the failure? A. I couldn't tell exactly
—three hundred thousand.

Q. What—pounds? A. Yes; and then we had
a lot of stock.

By Mr. Larkin:

Q. Well, Mr. Kessler, when Mr. Morgan re-
turned the exchange that you bought, did you give 434
him a check for it? A. No; exchange was only
payable the next day.

Q. Oh! Then you gave him an exchange on Lon-
don for five thousand pounds? A. Yes.

Q. On the 29th? A. Yes.

Q. And you naturally wouldn't receive his check
until the next day? A. Until the next day.

Q. So that he returned you the draft for five
thousand pounds, and that ended the transaction,
so far as he is concerned? A. Yes.

Q. Now, that was in the afternoon of Tuesday,
wasn't it? A. Yes.

Q. And it looked rather hopeless to you at that 435
time, didn't it? A. Tuesday? Yes, it did, on Tues-
day evening. That was about six o'clock Tuesday
evening.

Q. That Morgan & Company called you up? A.
Yes.

Q. And you were in your office then? A. Yes.

Q. Now, have you a personal recollection at this
moment of going to Tuxedo on the 2:40 train on
Saturday, the 26th? A. Yes.

Q. You do remember that? A. Yes.

Q. And you are able to remember that, although
you had been going to Tuxedo all the fall? A.

436 Well, I remember it, because I was talking to Mr. Hockart, of Iselin & Company.

Q. On the train going up? A. Yes.

Q. Was that the occasion when you were applying for a loan? A. No.

Q. You mentioned this morning that you applied to Iselin & Company for a loan? A. Yes.

Q. Was it after this conversation? A. I didn't speak about loans to him.

Q. Was it after this conversation that you applied to Iselin for a loan? A. No.

Q. Before then, was it? A. Yes.

Q. You mean you asked Iselin & Company for a
437 loan prior to Saturday, the 26th? A. I don't know whether it was—— No, it must have been Monday that I applied to Iselin. It must have been the day I paid off the Central Trust.

Q. Now, are you remembering this as a matter of recollection, or are you gathering it from what has——? A. No; I didn't go around to anyone until I found that the Central Trust insisted on being paid off.

Q. Now, who told you that the Central Trust insisted upon being paid off? A. Well, I had a long talk with Wallace and with Olcott.

Q. On Monday? A. On the Monday.

Q. Well, it was after that, then, that you went to
438 see Iselin? A. It was after that; yes.

Q. Well, I thought you said a moment ago that it was before Saturday that you had seen him? A. No, I corrected that.

The Special Commissioner: He corrected that. He said it must have been Monday.

Q. Well, now, after Iselin & Company—was that the first house you went to for the loan? A. No; I think I went to the City Bank first.

Q. You went in person, did you? A. Yes.

Q. You went there. Then you went to Iselin?
A. Went to Iselin.

Q. And where next? A. Then to Vernon Brown. 439

Q. And where next? A. I don't remember the order. Well, Morgan—I only went the next day.

Q. Now, do you happen to know what obligations, domestic obligations, were maturing on the 26th and 25th of October? A. Domestic?

Q. Yes; in the way of loans other than the Central Trust's? A. You have mentioned that the Central Trust Company called their loan. A. It was not maturing. Well, as a rule, all these people loan on call, but really it is a time loan. The only thing is that the banks do not like to put it down on time, that is all, and they generally give you four or five days' notice, so you can't call it maturing. 440

Q. You mentioned the loan as being called by the Central Trust Company on Friday, the 25th of October? A. Yes.

Q. Do you remember any other loan being called on that day? A. No.

Q. Or in that week? A. No.

Q. Were there any other time obligations coming due on that week? A. No.

Q. Your recollection now is that there were demand drafts paid at Glynn, Mills, Curry & Company, aggregating how many thousand dollars, payable the next week? A. About sixty thousand pounds during the week.

Q. Well, probably more than that, Mr. Kessler? 441
A. Well, it may be. It might be sixty-five thousand.

Q. Now, the condition in regard to borrowing money was just as bad on the 25th and 26th as it was on the 21st and 22d? A. I don't know. I didn't borrow any money that week.

Q. Well, you remember, do you not, the condition on the Stock Exchange on Friday, the 24th? A. Yes.

Q. Do you remember that there was no money at

442 all available there until two o'clock in the afternoon? A. Yes.

Q. Wasn't it because of that condition of practical unavailability to borrow money that you postponed efforts to secure it until the following week, hoping for better things? A. Well, I always try, in making a loan, to borrow after the Sunday, because it is always easier. You have always got to pay on the Saturday or Friday more than you have on Monday; and that goes throughout the year.

The Special Commissioner: Besides, you gain the day or two?

The Witness: You gain the interest.

443 Q. Well, the conditions on Thursday and Friday were very bad, were they not, so far as borrowing money was concerned and rate of interest? A. I don't know.

Q. You remember the conditions? A. I remember the conditions. I don't think things were ever very good—the conditions of that week.

Q. The conditions were especially unfavorable toward the inability to secure money on almost any kind of collateral? A. Yes.

Q. And that was especially the condition of Thursday and Friday, wasn't it? A. I don't know whether it was especially Thursday and Friday; 444 I suppose Thursday was a very bad day.

Q. Thursday was a very bad day, wasn't it? A. Yes.

Q. You remember, do you not, that they contemplated closing the Stock Exchange? A. I heard of it, yes.

Mr. McLaughlin: What do you mean by "they"? That is too indefinite, Mr. Referee.

The Special Commissioner: That is pretty indefinite. "They" contemplated closing the Exchange." It seems to me that is pretty broad.

Mr. Larkin: What the condition was. I am

showing what his state of mind must have been, if he was in touch with the situation there. 445

The Special Commissioner: You asked him if "they" were not contemplating closing the Stock Exchange. It seems to me that is very indefinite.

Q. You knew, Mr. Kessler, that on Thursday there was no money upon the Exchange to be borrowed at all? A. No.

Q. That is true, isn't it? A. Yes.

Q. And that condition existed until about two o'clock in the afternoon of Thursday? A. Yes.

Q. When twenty-five millions were sent over to be loaned? A. Of which about seventeen was needed—seventeen was taken. 446

Q. Do you know what the rates of money were quoted at on that Thursday? A. Of that seventeen millions, I don't know what they loaned it at. I suppose it was loaned at about 50%.

Q. And the next day, do you know what it was then? A. It was about the same; went up to 115, I think.

Q. And Saturday about the same? A. Only there was no loan. Saturday is a holiday; they do not make any loans.

Q. They make loans on Friday to hold over until Monday—is that it? A. Yes.

Q. Do I understand you to say that the securities depreciated between Friday, the 25th, and Tuesday, the 29th, ten or fifteen points, as a general rule? A. I said about ten points. I don't know. I cannot make an accurate statement of that, but it looked that way to me. I didn't work it out to see. 447

Q. The great bulk of the securities which were not pledged as loans consisted of unlisted securities, did they not? A. Yes.

Q. You argued, I suppose, from the fact that if the Stock Exchange went down on listed securities

448 the same thing would apply to the unlisted securities, did you? A. How do you mean?

Q. I mean to say if the Stock Exchange collateral listed securities depreciated, you argued that, although the unlisted securities were not apparently depreciative, so far as the Stock Exchange was concerned, yet you could not borrow on them? A. That is true.

Q. Who was it that reported to you, Mr. Kessler, where these securities were taken by your cousin, Mr. Henry Kessler? You say you subsequently learned where they were deposited. Who told you? A. I think it was Bertie or Nestly. I don't know.

449 Q. Didn't you know whether or not they had access to this safe deposit vault in which these securities were placed? A. Yes; they told me they had access to it, otherwise we should not have been able to change the collateral, as we had been doing before, in case we sold anything.

Q. You had from time to time changed collateral? A. Yes.

Q. And the condition was to continue under the new arrangement? A. Well, there was no new arrangement about it.

450 Q. Well, I understand that they were in this safe deposit vault under the name of Kessler & Company? A. Yes; Kessler & Company, Limited.

Q. And for that reason Bertie and McLean and Nestly had access to the vault? A. Yes.

Q. Do you know how long those securities were kept there in the name of Kessler & Company, Limited, in the safe deposit vault? A. In our safe deposit vault?

Q. No, after they were taken from your safe deposit vault, how long were they kept— A. I don't know.

Q. Have you access to the present safe deposit vault in which these securities are kept by Kessler

& Company, Limited? A. No; I don't know where they are. 451

(Mr. Larkin at this time postpones his examination of the witness until he shall have had an opportunity to examine the books of the bankrupts.)

CROSS-EXAMINATION BY MR. SEYMOUR:

Q. Mr. Kessler, will you please explain the method of doing business of Kessler & Company?

A. The exchange business?

Q. Yes. First take the exchange business. Explain as succinctly as you can. A. Well, the exchange business, we have a lot of credits. They are often open credits which have to put up collateral, and we draw exchange; and this is like a constant wheel—goes around all the time. One day we may be short, the next day we are long. It goes throughout from one day to the other, and especially now, where they have so many more steamers, it is very much more active than it used to be, in the olden days, when we only had two steamers a week. But the profit, of course, is very much smaller, and, in order to do business, where formerly we used to turn over two hundred thousand dollars and make a nice profit, now you turn over two or three million and don't make as much. 452

Q. Well, more in detail than even that, Mr. Kessler. Go more into detail, just as if we were all entirely ignorant of the foreign exchange business and you were going to explain how business is conducted. What do you mean by "open credits"? A. Open credit is where they let you draw on them without your having to put up any collateral, and they charge you a commission for doing so. We have some accounts where we draw checks in Germany and Paris and where we don't need to remit for two weeks, and they charge us a commission 453

454 on the overdraft and charge us one per cent. above bank rate of the other side.

Q. May I ask you to still further explain this foreign business. You started with a certain capital, when your firm began, and how did you use that money in your business? A. Well, we used some of it in the exchange business; others we carried stocks and bonds, and some we used for carrying dry goods accounts and discounted bills.

Q. Now, you have mentioned, in answer to some question Mr. Larkin asked you about long drawings and short drawings. Will you explain what long drawings are? A. A long drawing is a draft that
455 you draw at ninety days' or sixty days' sight on someone in Europe, and you sell that draft and you get the money for it at once. You don't need to cover that until it falls due on the other side.

Q. Now, then, how do you cover that? A. You cover by buying grain bills or cotton bills or anything else by cable, and if exchange depends on the price of exchange in London, it is very often that you get Paris to pay London for your account or for London to pay Paris and try and make the difference of exchange. That is what you call "arbitrage."

Q. So that, when you stated, a short time ago, that you had drafts on Amsterdam and different
456 German places, etc., you meant that you were drawing on those houses to meet London acceptances—is that correct? A. Yes.

Q. Will you take for me one single transaction and carry it through its different steps, showing exactly how any one transaction is done? A. Well, now, for instance, with Amsterdam. Suppose a man to-day comes in with a lot of grain bills on Amsterdam. Well, I buy those and send them along, and when they are on the water, then I ask Amsterdam to pay London so much.

Q. Pay London so much? A. Well, the one thing

is in guilders and the other transaction is in pounds. 457
Against that I sell demand bills here.

Q. You mean you ask London to pay that bill, plus the discount? A. No; I have to pay the discount. I stand that.

Q. Do you sell the bill here? A. No; I buy the bill on Amsterdam, which is to be a sixty days' sight bill, send it over to Amsterdam, and then they will discount those bills. But, in the meantime, whilst the bill is on the water, I will cable Amsterdam to pay London the equivalent, which they always do.

Q. What is the next step that you take here? A. Then I sell my demand. 458

Q. You sell a demand. What is that demand that you sell? A. A demand on London.

Q. That is to say, you sell a demand that you have on a banking house in London to somebody that wants that? A. Yes.

Q. Carry the transaction out. A. That is the way it is done—and the regular, just the simple way, is, you send them along bills to a discount house in London, and I draw on that discount house at the same time.

Q. Where does the profit come in, Mr. Kessler? A. The profit will come in out of exchange, exchange rates, between sixty and ninety days and demand sterling. Now, for instance, those people 459
who had a lot of money just lately made a tremendous lot of money if they had money on the other side, because they could sell their cables at 4.94, and buy demand at 4.82, which was a very fine profit of five per cent. That does not happen more than once in a decade.

Q. You stated also that part of your business was carrying stocks and bonds? A. Carrying? Well, we have not been carrying much stocks and bonds lately.

Q. Part of your business, you stated, was dis-

460 counting? A. Discounting? We have discounted a good deal.

Q. Yes? A. Lately we could discount, say, at 8%, and then the banks might rediscount it for us at 6% or 5½%, and we would make that difference.

By Mr. McLaughlin:

Q. Have you frequently, during the past six years, had as much as \$300,000 maturing on one day? A. Oh, yes, sir; a good deal more than that.

Q. A good deal more than that? A. Yes.

461 Q. What is the largest amount that you remember coming due, maturing, on one day during those six years? A. Well, I should think five or six hundred thousand dollars, I suppose, or more. I couldn't tell how much matured.

Q. Now, if you had to provide for a large amount like that, how would you go about it to meet, say, three hundred thousand dollars' worth of paper that would be maturing on a certain day? A. Well, I wouldn't have been able to do it lately; but say four or five years ago I was not borrowing in the street any money, practically, and I would go around to a bank and borrow \$250,000 there and \$100,000 there, and then we would sell exchange if we needed any more.

462

ALFRED KESSLER, direct-examination resumed.

By Mr. Larkin:

Q. Mr. Kessler, since the adjournment on Saturday, have you talked over these matters with anyone other than your counsel? A. No.

Q. That you were questioned about on Saturday? A. No.

Q. Have you produced a telegram or cable which you said you received? A. Well, I said I would, and I really do not know how I was so foolish, because that cable arrived at Tuxedo, and all the tele-

grams at Tuxedo just go through the club house, 463 and then they just telephone the answer to my house, and I remember what it was. It was only two words—"Refrain Morgan." That meant "Confer with Morgan."

Q. What did "Refrain" mean? A. "Confer with."

Q. Was it a code word? A. Yes; that is all it was.

Q. Have you been able to find the cable which you sent to Mr. Flinsch on that Sunday? A. No, I could not find it.

Q. Now, was this suggestion of calling on Mr. Morgan—that came originally from Flinsch, then, 464 didn't it? A. No, it was a thing that I should have done, anyway. It was absolutely superfluous, that cable.

Q. Well the suggestion did come from Flinsch, didn't it? A. Well, the suggestion came, but I was going to do it without the suggestion.

Q. Well, why did you determine to apply to Mr. Morgan? A. Well, because he was the only man in a case of that sort that could do anything, really, there are some private people that might have been able to help me, but they were both away at that time, both in Europe.

Q. You had not any personal friendship or acquaintance with Mr. Morgan, had you? A. Well, 465 I had known Mr. Morgan—I played piquet with him and dined with him and so on, yes.

Q. The real reason that you went to Mr. Morgan was because Mr. Morgan was active in restoring the financial confidence of the community, wasn't it? A. Yes.

By the Special Commissioner:

Q. And a banker of large means? A. He was the only man that had any money at that moment.

466 By Mr. Larkin :

Q. And you knew he was active in trying to tie over the conditions that prevailed during those two weeks, didn't you? A. Yes.

Q. You have stated that your recollection of the occasion when you saw your uncle, Mr. Henry Kessler, was somewhat indefinite. You didn't recollect. Do you remember on your former examination—
A. Yes.

Q. Well, now, you had not seen your cousin for some years, had you? A. Yes, I saw him when I was over last year.

467 Q. What time? A. When I was in Europe, it was—in July—July, yes.

Q. July, 1906? A. Yes, sir.

Q. Now, you had not seen him since that, naturally? A. No.

Q. Well, now, when he came here—

By the Special Commissioner :

Q. When did he arrive here—when did you first see him; October? A. The 4th of October.

Q. The 4th of October? A. Somewhere around there. Well, I did not see him that day, because I was in Tuxedo. I saw him on the Monday.

468 Q. What day was that? A. The 7th.

Q. The 7th? A. Yes, the 7th was the day I saw him.

Q. At the office? A. At the office.

Q. At the office of Kessler & Company? A. Yes.

By Mr. Larkin :

Q. Well, now, do you remember so clearly that you met him on the 7th of October, Mr. Kessler, that you made an entry of it in the book? A. No; because I intended to meet him on the steamer, and then I found I could not get there on the Friday. I had made arrangements to stay down in Tuxedo for

the Saturday, and so I know the first time I saw him was on Monday. 469

Q. Well, when did you first meet him to have a talk with him? Did he come to visit you at Tuxedo? A. I don't think I had any special talk with him.

Q. Well, did he come to visit you at Tuxedo? A. No.

Q. Well, where was it you met him on the 7th of October? A. I did not meet him. I was in the office and he came to the office.

Q. Well, how long did he stay in the office? A. I don't know.

Q. Well, was he there next day, the 8th? A. He may have been. I couldn't tell you whether he was there the next day or not. I don't think he was, because I think he went to Philadelphia. 470

Q. And after he left New York for Philadelphia—he did not return until after you had written a letter to him asking him when he was to return, which was the 22nd of October. Do you remember that? A. I wrote him a letter. I didn't exactly ask him to return.

Q. I didn't say that you did ask him to return. I said in which you asked him when he was to return. Isn't that the correct construction? A. Yes.

Q. Now, then, you did not see your cousin from the 7th till the 22nd of October? A. I don't know whether it was the 22nd. 471

Q. Well, now, when he came to the office on the 22nd—you had a private room there, had you not? A. Yes.

Q. Well, didn't you invite your cousin into the private room? A. No, not that I know of.

Q. Didn't you go into the private room and talk with him? A. I, as a rule, never sit in the private room. Flinsch sits in the private room.

Q. Flinsch wasn't there? A. He was away.

Q. Didn't you use the private room when Flinsch was away? A. No, not much.

472 Q. So your cousin, Henry, did not use the private room? A. They had used it; anyone may have gone in and out there.

Q. You don't recollect now that he used this private room especially, do you? A. No.

Q. He was in and around in the office? A. Yes.

Q. He was moving around in the office and talking to the clerks, just as you were? A. He may have been.

Q. Well, wasn't he? A. Well, I really don't know; I wasn't watching.

Q. Well, didn't he invite you to dine with him? Did you meet him at dinner at any time? A. I
473 dined with him once at the Gotham, with Mrs. Kessler.

Q. And you and your cousin and his wife—was that the party? A. Well, his wife did not come down. She was not well that night.

Q. Well, you and he dined alone? A. No, Mrs. Kessler.

Q. Your wife? A. Yes.

Q. Do you remember when that was? A. No, I don't remember.

Q. Well, can you recollect it as to whether it was on the occasion of his return to New York from Atlantic City? A. No, I do not know.

474 Q. Well, where was it? A. Where we dined?

Q. Yes. A. We dined at the Gotham.

Q. Well, did your cousin stop at the Gotham after his arrival in New York on October 9th? A. I don't know.

By the Special Commissioner:

Q. He arrived in New York on October 4th? A. I don't know; I don't know which hotel he went to first.

By Mr. Sprague:

He did go to the Gotham. A. Yes.

By Mr. Larkin :

475

Q. Now, you have heard what Mr. Henry Kessler states, that when you came to dine with him, you came on the 21st of October?

By the Special Commissioner :

Q. Does that correspond with your recollection?
A. No, I don't know at all.

Q. Don't you know you did dine there? A. I dined there one evening.

Q. And after his return from Atlantic City—you know that, don't you? A. No, that I am not so sure of. Yes, I suppose it is that way.

Q. Well, if you don't know, you don't. A. I don't really know. 476

By Mr. Larkin :

Q. When you went to dinner, how long were you there? A. How long?

Q. Yes. How long did your visit last? A. Well, we dined and went home about a quarter to 10 or half past 9—something like that.

By the Special Commissioner :

Q. You were there about two hours, were you?
A. Yes. 477

By Mr. Larkin :

Q. And, during this whole time, were you in the main dining room of the hotel? A. Yes, we were, I think.

Q. Well, didn't you go to your cousin's rooms after dinner? A. We went upstairs for a short time, yes.

Q. Your cousin had a sitting room? A. My cousin had a sitting room.

Q. And after dinner I presume you went upstairs? A. Yes.

478 Q. And your cousin's wife was upstairs? A. Yes.

Q. She did not come to dinner, and I presume that your wife and your cousin's wife talked together, didn't they? A. Yes.

Q. And that gave you and your cousin an opportunity to talk together? A. I think so.

Q. Did you talk any business on that occasion? A. I cannot remember what we talked about.

Q. Well, you stated on your direct examination that you were aware that the Knickerbocker Trust Company had asked assistance from the Clearing House committee on that day—do you remember?

479 A. It was that day.

Q. Did not that fact give you a topic of conversation with your cousin? A. Well, yes, we talked about all those things.

Q. Now, when you say "all those things," can't you briefly state what it was that you talked about? A. No, I could not. It is impossible to tell those things,—what you talked about, really. I can't remember.

Q. You were actively in business in the financial district in this city, weren't you? A. Yes.

Q. And you were aware of a very remarkable occurrence, where the third largest trust company in the city had to apply for assistance? A. Yes.

480 Q. And you say you were talking about all those things. Now, when you say "all those things" you mean, undoubtedly, the general financial conditions which prevailed throughout the city and the country at that time; is that right? A. That is right.

Q. Now, did you discuss with your cousin how the general financial conditions affected your business? A. No.

Q. Your conversation with him was "general"? A. It was general, yes, sir.

Q. And you did not indicate to him that your

house might be affected in any way whatever? A. 481
I do not think so, because I did not know it myself.

Q. Did not know what yourself? That the house would be affected? A. That our house would be affected.

Q. At the time, you had large obligations outstanding, didn't you? A. Well, we always had large obligations outstanding.

Q. Well, didn't you say on Saturday that in prior years you had not been a borrower in the Street for a large amount of money, whereas, at the present time, you were a heavy borrower in the Street? Don't you remember that? A. Yes, I remember.

Q. So that, when a man is a borrower, his condition is somewhat precarious, isn't it? A. No, not necessarily. 482

Q. In conditions of that kind? A. No, not necessarily.

Q. As a matter of fact, during this period, the amount of your drafts and obligations had increased during the past two or three years, had it not, from what it had been three or four years previous? A. Well, I don't know. They increased in the year 1903 very materially, and then went down again.

Q. Well, then, after they went down, they went up again, didn't they? A. Yes, they were rather large. 483

Q. 1903 was one of the panic years? A. Yes. You mean 1903?

Q. And your drawings then went up during the panic time, did they not? A. Yes.

Q. And, by reason of that fact, you were tided over the condition which existed in 1903? A. Which we ought really to have done this time, too.

Q. And you were then trying to do this year what you had done in 1903; that is, draw upon foreign securities which were not affected by the conditions here? A. Yes.

484 Q. And, by increasing your liabilities in that way, and thus securing cash, you hoped to be able to repeat what you did in 1903?

Mr. Sprague: Is not that rather leading?

The Special Commissioner: Yes, I think it is. I don't think that it does any particular harm to anybody.

Mr. Sprague: No, that is why I am allowing it to go on. I will withdraw the objection.

The Witness: I said yes, all houses did that.

485 Q. I did not ask you what other houses did. I am simply asking you whether this present year you did not increase your drawings and, therefore, your liabilities to foreign houses very largely? A. No, they were smaller than that.

Mr. Seymour: These questions are very general, and I submit, when his answer does not come just the way that counsel wants it, that he should not be shut off.

The Special Commissioner: I think that he has had a fair opportunity; he knows the object of this examination. He is an intelligent man. He does not need any particular protection, so far as I see.

486 Q. Now, did you suggest to your cousin the necessity of having any money in your business, any additional capital?

Mr. Sprague: When?

Q. When you met him on the 21st of October?

The Special Commissioner: On the occasion of the dinner.

A. I don't think so, no.

Q. You don't remember? A. No, I don't think I did.

Q. You could have used some additional capital at that time, couldn't you? A. You can always use additional capital.

By the Special Commissioner :

487

Q. How was it at that time? He asked you whether at that time you could. A. Well, I could at all times.

By Mr. Larkin :

Q. You had increased your drawing account with the Manchester house on the August just preceding, had you not, by 20,000 pounds? A. Yes.

Q. Didn't you try at that time to get more than 20,000 pounds increased drawings? A. No.

Q. Is that all you had to draw? A. Yes.

Q. You didn't ask for it yourself, did you? A. Well, I think I—— 488

Q. Did not Flinsch do that when he was over there? A. Well, I might have written to Flinsch.

Q. You don't know what Flinsch asked the Manchester house—how much he asked for, do you? A. No.

Q. Your conversation with your cousin in the Hotel Gotham on the evening of October 21st, in his private sitting room, lasted an hour or so—an hour? A. I think so, about; not quite. I don't know; we were upstairs an hour; somewhere near an hour.

Q. The next day he came to the office? A. That I don't know. 489

By the Special Commissioner :

Q. Will your memorandum book give you any assistance? A. No, I haven't anything in my memorandum book.

Q. I saw you referring to it several times. A. That is only for the dates I am looking.

By Mr. Larkin :

Q. Now, isn't your recollection, as it has been refreshed by the questions that have been put to

490 you—are you able to state any more definitely than on Saturday the length of time that Mr. Henry Kessler spent in your office on October 22nd? A. No, I couldn't tell.

Q. Did you take him out to lunch? A. He lunched with me once or twice at the Downtown Club, but whether that was the day or not I do not know.

Q. Now, did you lunch again with him? You say you lunched once or twice with him? A. Once or twice, yes, at the Downtown Club.

Q. And you could find out what those dates were, couldn't you, by referring to your vouchers or something? A. Yes, I could if I pay my October bill now.

Q. Well, now, you say you do recollect a little bit more to-day than on Saturday of the different times you have talked with your cousin, do you not? You have mentioned, for instance, meeting at the Hotel Gotham? A. Yes, but I don't remember what the conversation was.

Q. I am trying to refresh your recollection. A. Yes, those things are very hard.

Q. Now, do you remember any other occasion when you met your cousin other than at your office and at the Hotel Gotham and at luncheon at the Downtown Club, during that period down to the 25th? A. He lunched with me one Sunday; one Sunday, the 3rd of November, it was.

Q. You don't remember any other occasion when you met him? A. I think we only took four meals altogether.

Q. Now, when your cousin was here, did you go with him to visit any friends of yours? Did you introduce him to any friends or go with him to Tuxedo? A. No, only those at the club, I think.

Q. People that you have known in years past? A. People I lunched with every day.

Q. Now, since the last examination, have you

thought of anyone else that you applied to for loans during this period of the two weeks of October 21st to the 28th? 493

Mr. Sprague: He has testified it was only on the 28th and 29th he wanted loans.

Q. Do you remember anyone else that you applied to during this period? A. No.

Q. You went to a friend of yours, Vernon H. Brown? A. Yes.

Q. Now, ordinarily, you were not in the habit of applying to personal friends for loans, but you could not naturally go into the market to people who made a business of loaning money? A. No, I never have been on the market. 494

Q. You do not consider borrowing money from the National City Bank in the market? A. No.

Q. I mean when you went out to borrow money, you went to the places where money is loaned? The National City is one of the largest lenders? A. Yes.

Q. It had been your custom to apply to banks of that character? A. Yes.

Q. But when you applied to Mr. Brown, it was somewhat unusual, wasn't it? A. It was unusual. The only thing is that——

Q. Just answer whether it was unusual or not? A. Unusual.

Q. Other than Mr. Brown, do you now recollect that you applied anywhere else? A. Not more than the people that I told you of the other day. 495

By the Special Commissioner:

Q. When did you make the application to Iselin & Company? A. On the Monday.

Q. And your application to the City Bank? A. That was all Monday I was going around.

Q. Monday, the 28th, you made your application to the City Bank? A. Yes.

496 By Mr. Larkin:

Q. Now, did you go to any other personal friend or acquaintance who was not in the business of lending money? A. No.

Q. Do you remember now, since your recollection has been refreshed, whether you consulted about the condition of your house with any person whatever during those two weeks of October 21st and 28th? A. No, I did not consult with anybody.

Q. Did you talk with anybody about it? A. Not that I know of.

Q. You had friends and acquaintances in the Street of many years standing, had you not? A. Yes.

Q. And you wanted to do the best you could for your house, did you not? A. Naturally.

Q. And you were alone, were you not? A. I was alone.

Q. And you mean to say in such a condition, you did not consult with anyone as to what you should do under the circumstances? A. No, not until Tuesday, the 29th—except with Mr. Taylor, of course, on the Monday.

Q. Did you have any talk with Mr. Bacon, Mr. Horace Bacon? A. No, not until the 29th. I don't know the dates, but I think it was the 29th that I went there.

Q. Well, who is Mr. Horace Bacon—a former partner of yours? A. No, he was not a partner. He was in the firm. I mean he had the power of attorney.

Q. What is his business now? A. He is now with Kissel, Kinnicutt & Company.

Q. And who are Kissel, Kinnicutt & Company? What is their business? A. They are in the same sort of business that we are.

Q. Well, did you know any other member of the firm of Kissel, Kinnicutt & Company other than Mr. Bacon? A. I know them all.

Q. Well, very well—— A. Mr. Kissel used to be 499
my partner.

Q. In Kessell & Company? A. Yes.

Q. Well, how about Mr. Kinnicutt? A. Mr. Kinnicutt?

By Mr. Sprague:

Q. Mr. Gustave Kissel? A. Yes.

By Mr. Larkin:

Q. Is he a friend of yours, too? A. He is a
friend of mine, too.

Q. Was he formerly in business with you? A. 500
No.

Q. You say you had a talk with Mr. Bacon. Was
Mr. Kissel present at the time? A. I don't know
whether Kissel was present at that moment.

Q. Was it over in their office? A. Well, I don't
know. I think it was, unless—Bacon comes into
the office every—very often into our office, but I
think I talked with him in his office.

Q. Well, what does Bacon come to your office for,
to buy exchange? A. No, we ask him a lot of ques-
tions. He knows a lot of the old accounts. He was
with us for a great many years.

Q. Now, you say that you recollected that you 501
probably went over to the office of Kissel, Kinnicutt
& Company? A. Yes, but I cannot tell what date.

Q. Do you keep a telephone record in your office
of the people to call up? A. I, personally?

Q. No, I do not mean, I do not suppose you run
the telephone exchange, but is a record kept? A.
Well, Miss Flannery always kept that.

Q. And that record is there now? A. It was.
I don't know what has happened to it now.

Q. Well, you haven't any reason to believe it has
been destroyed at all? A. No.

Q. So that Miss Flannery's record would show

502 the date that you called up Kissel, Kinnicutt & Company or anybody else? A. Anybody else? It might not have been me.

Q. I mean, if you see a call, "Kissel, Kinnicutt & Company," it might be somebody else, or Mr. McLean or Mr. McGee, or Bertie or anyone? A. It would not necessarily be my own call.

Q. Did anyone go with you when you went to Kissel, Kinnicutt & Company's? A. No.

Q. You went alone? A. Yes.

Q. How many times did you go there? A. I don't know.

Q. More than once? A. Oh, I can't tell. I have
503 been there two or three days ago.

Q. I am not asking you about two or three days ago. A. I cannot tell how often I went there.

Q. Well, when you went there, what did you say to Mr. Bacon? A. That I don't remember.

Q. How long is that?

Mr. Sprague: Which day is that, do you know, Mr. Larkin?

Mr. Larkin: He says the day he went there is the 29th.

The Witness: I have not any distinct recollection.

504 Q. Then, it might have been prior to the 29th, might it not? A. No, I do not suppose so.

Q. Well, you naturally would go to Kissel, Kinnicutt & Company for advice or assistance rather than to Mr. Morgan, if it was obtainable in that quarter, wouldn't you? A. Yes, but that was a small house. It would not be obtainable there.

Q. Now, your attention has been called to the fact. Can't you, by bearing in mind the time you went to Morgan, state whether or not you went to Kissel, Kinnicutt & Company prior to that or not? A. I did not.

Q. Did not what? A. Go to Kissel, Kinnicutt & Company before I went to Morgan. 505

Q. So that your recollection is that you procured this loan from Morgan, did you not, on the 30th of October? A. I don't know what day it was—about that time.

Q. I show you the loan book, folio 161. Look at that. (The witness does so.)

Q. Does not that refresh your recollection that the loan that you secured on the 30th— A. 30th, yes.

Q. And that was the day you made a general assignment? A. Yes.

Q. There wasn't much use of going to Mr. Kissel after that, was there? A. No, but I had been— 506

Q. You had been to him before that? A. Mr. Morgan.

Q. No, I am speaking of Kissel, Kinnicutt & Company. A. No.

Q. You had been to him before that, had you not? A. I was at Morgan's on Monday. I don't know anything about Kissel, Kinnicutt & Company. I don't know when I saw them.

Q. You got this loan from Morgan on the 30th? A. Yes.

Q. And that was the day you made your assignment? A. That was the day I made my assignment. 507

Q. Now, there was no use of going to Kissel, Kinnicutt & Company to talk with them after you had made an assignment, so that, if you went to them at all, you must have gone prior to the 30th? A. Kissel, Kinnicutt & Company? I think that was the 29th I must have gone to them. That is the reason I thought it was the 29th.

Q. Now, are you sure it wasn't long prior to the 29th, Monday, then, around the 24th or 25th? A. No. Kissel, Kinnicutt & Company?

Q. Yes. A. I rather wish it had been.

538 Q. You are quite clear it was not as early as the 24th? A. No, it was not.

Q. Now, do you recollect whether you saw any one else over there besides Mr. Bacon when you went there? A. Not to talk to, I think.

Q. Did you talk to Mr. Kissel? Wasn't he present? A. No, he was out.

Q. What did you go over there for? A. What did I go over there for?

Q. Yes. A. I went over to tell them that I had been to Mr. Morgan.

Q. Well, and did you tell him that you got a loan of \$190,000 from Mr. Morgan? A. No. This
509 was the night before that I saw Mr. Kissel.

Q. You saw Mr. Kissel the night before you got your loan from Mr. Morgan? A. Yes.

Q. Did you tell him you were going to ask Mr. Morgan for assistance? A. I told him I had asked him.

Q. Well, I understand that you went to Mr. Morgan on the 29th? A. Yes, that is what we have been stating all the time.

Q. And you secured a loan from him on the 30th, did you not, for \$190,000? A. On the 30th.

Q. That did not represent the limit of your obligation to Mr. Morgan, did it? You wanted Mr. Morgan to assist you generally? A. Yes.
510

Q. And wanted Morgan to take over the loans which were called? A. They were not called—those two loans he took over.

Q. I think you said on your examination on Saturday that you transferred loans to Mr. Morgan because you believed they would not be sold out? A. That is the reason.

Q. So you had reason to believe they would be called anyway, didn't you? A. I thought they might be.

Q. You say you went over to Kissel, Kinnicutt & Company and told them that you were going

to see Morgan. Did you tell them what you were going to see Mr. Morgan for? A. I asked for Mr. Kissel, and he was out. Mr. Kissel, when he heard I wanted to see him, came around to see me, and then I told him I had been to see Mr. Morgan. 511

Q. Don't you remember now, after making that statement, that you saw Mr. Bacon or Mr. Kissel before that occasion which you have just testified to? A. I don't think so.

Q. Are you sure you did not? A. I don't think so, not on that business, anyway.

Q. Do you recollect seeing them on any business about that time, within the period of a week or ten days of that time? A. No. 512

Q. Had Kissel, Kinnicutt & Company any interest in your business whatever? A. No, none.

Q. Did they hold any of your paper or drafts or anything of that kind? A. I don't think so at that time. They may have done before.

Q. Were they interested at all in these securities of the Manchester house, as shareholders or anything of that kind? A. I believe Mr. Kissel is a shareholder in the Manchester house.

Q. To what extent? A. That I don't know.

Q. Is Mr. Kinnicutt a shareholder in the Manchester house? A. No.

Q. Then I understand your testimony to be, in substance, regarding Kissel, Kinnicutt & Company, that you went over to see Mr. Kissel; that firm or some members there; that they were not in— 513

Mr. Sprague: When, Mr. Larkin?

Q. (Continuing.) That subsequently Mr. Kissel came to you and that you told him that you had applied to Morgan. That is the substance of your testimony? A. That I had applied to Mr. Morgan?

Q. That you had seen Mr. Morgan? A. Yes.

Q. Your recollection now is that your call upon Kissel, Kinnicutt & Company and their return call

514 upon you was on the 29th of October? A. On the 29th? I think so.

Mr. Sprague: Tell him the day of the week. Perhaps he will know from that better.

Q. The 29th was Tuesday? A. I think it was Tuesday.

Mr. Sprague: He did not say he went over to see that firm.

Mr. Larkin: No, he did not; he said he went over to see Mr. Kissel and Mr. Kissel was out.

Q. As I understand, you asked for Mr. Kissel when you went over there? A. I think so.

515 Q. And Mr. Kissel was out? A. Yes.

Q. Did you ask for Mr. Bacon? A. No; he was there, and I talked with him.

Q. Yes? A. The 28th I went to Morgan and then I went again on the 29th.

By the Special Commissioner:

Q. You are sure about those dates, Mr. Kessler? A. I think so.

By Mr. Larkin:

516 Q. So, then, it appears now that you made two visits to Mr. Morgan, on the 28th and 29th, and on the 30th you secured two loans from Mr. Morgan amounting to \$190,000? Is that your recollection now of the Morgan transaction? A. \$190,000.

Q. Now, you stated that Mr. Flinsch did not make the suggestion of calling on Morgan, that it had already occurred to you. When it had occurred to you of going to see Mr. Morgan? A. It occurred to me, I think, in about '95 or '93—'93—in that panic year, because he helped a lot of my friends during that time, and I said, "Why, he is the man to go to, if there is any trouble."

Q. When did it occur to you to go to Mr. Morgan in 1907? You stated that when you got Flinsch's

telegram on the 27th that it was unnecessary for him to suggest your going to Morgan. A. Because I intended to go myself. 517

Q. When was it you first thought of going to see him? A. Oh, I don't—

Q. Did you and Flinsch think of it at the same time? Hadn't it been in your mind on Saturday and Friday before that, that you might have to go and see Mr. Morgan? A. I don't know.

Q. With money at 115 per cent., and bearing in mind just now what you have stated, that Morgan was the only man that had any money, didn't it occur to you to go to him in the week before that, or did it only occur to you on Sunday? A. Sunday. 518

Q. Didn't it occur to you then? A. Yes.

Q. That was the idea that occurred to you when you were at Tuxedo? A. On the Saturday evening, yes.

Q. Mr. Kessler, one of the largest accounts that you had was with Glynn, Mills, Currie & Company? A. Yes.

Q. Is the arrangement regarding your right to draw on them expressed in writing in any of the letter books of your firm? A. It may have been, but then that would be in 1882, when they first started.

Q. Do you know was this account of Glynn, Mills, Currie & Company secured? A. To a certain extent. 519

Q. And where were those securities? A. With them.

Q. Have you a list of those securities? A. Well, they have down at the office. I have not got them up here.

Q. Your arrangement was that you should draw up to an amount represented by the market value of those securities at any time?

520 Mr. Sprague: Ask him what the arrangement was.

The Witness: We did not need to have cover.

By the Special Commissioner:

Q. What do you mean by "cover?" A. Well, I mean that as long as we were not overdrawn with them in London over whatever the securities were worth—I think 35,000 pounds, somewhere around there—we could go on, don't you know.

Mr. Larkin: What is the question now?

521 (Question repeated as follows: "Your arrangement was that you should draw up to the amount represented by the market value of those securities at any time?")

The Witness: Yes, but we could draw any amount above that, as long as they had cover at the time these things fell due.

By Mr. Larkin:

Q. You mean by "cover" that you would have to supply them with cash to meet the drafts? A. Not necessarily cash—grain sales or cotton bills, which they would discount, or leather bills—any produce which is exported to that country.

522 Q. The cash or the equivalent of cash? A. Merchants' exchange.

Q. And, naturally, such securities or bills or collateral would have to be acceptable to Glynn, Mills, Currie & Company? A. Oh, no, not that.

Q. Let me see if I understand you. A. We would send any exchange over, and now and then Glynn, Mills, Currie & Company—they never said anything about the exchange we sent. The Union Discount or the National Discount—then they might telegraph "Too much in the market, hard to discount." Those are the only times, really. But those things we sent to Glynn, Mills, Currie

& Company, I don't think Glynn ever said any- 523
thing about in any of the remittances we made,
ever.

Q. I don't quite understand that, Mr. Kessler.
A. Well, now, take, for instance——

Q. Well, now, Mr. Kessler, you had securities
with Glynn, Mills, Currie & Company, say for
35,000 Pounds? A. Yes.

Q. Now, up to the extent of 35,000 Pounds, or
whatever the actual value of the security was, then
you could draw without cover? A. Yes.

Q. When you exceeded that, then you had to pro-
vide what you call "cover"? A. Yes.

Q. Which is a well recognized mode of exchange 524
between people in your business, isn't it? A. Yes.

Q. Consisting of cash or cotton bills or merchan-
dise bills? A. Or payments from our credits on
the other side.

Q. Payments from your other correspondents to
their house? A. Yes.

Q. Now, those things represent substantially cash
or the equivalent of cash, property or property in-
terests? A. Not necessarily cash.

Q. Except the transfer of credit, your cotton
bills represent drawings against cotton? A. Draw-
ings against cotton.

Q. Do you know how much in excess of the se- 525
curities that Glynn, Mills, Currie & Company had
that you drew in the last two weeks? A. I don't
know, and it doesn't much matter.

Q. It doesn't matter? A. No.

Q. It doesn't matter if you sold exchange on
London on Saturday or Monday prior to your fail-
ure on Glynn, Mills, Currie & Company when you
ought to have known it would not be accepted—
doesn't that matter? A. Because I didn't know it
would not be accepted. I had hopes until the
very last moment of getting the money.

Q. You had hopes of covering by getting the

526 money and transferring \$700,000 or a million dollars to Glynn, Mills, Currie & Company on Monday, Tuesday or Wednesday? A. No.

Q. You say it wasn't \$700,000. A. No.

Q. What do you say it was? Was it \$500,000? A. No—for the week, £60,000.

Q. What week? A. For the week between the 28th and the 5th of November.

Q. And in making that statement, you have not the books before you to make it from? A. No, but all I remember, that is all.

Q. Is this your recollection of the books or what you were told by Mr. McLean or somebody else?

527 A. No, that is my recollection of the books.

Q. Do you know what the balance now against your house in favor of Glynn, Mills, Currie & Company is, or do you know what the drafts, balance of drafts, against you amount to? A. (No answer.)

Q. \$710,000, is that correct? A. I dare say, if the books say so.

Q. And that represented drafts which were coming due until what time? A. That would represent drafts coming due until—I could not say what date. It would be during the ten or twelve or fifteen days, something like that.

By the Special Commissioner:

528 Q. You mean beyond November 5th? A. No, these would be bills drawn all the way from—

By Mr. Larkin:

Q. October 19th, wouldn't they? A. About October 19th—yes, to the 30th.

Q. Up to the time of your failure? A. Yes.

Q. That is to say, between— A. Ten or eleven, twelve days.

By the Special Commissioner:

Q. From October 19th up to the 30th, you drew no bills after your assignment? A. No, on the Tues-

day, in fact, we returned the money. We did not pass the checks through, when I found out that we could not do anything; I did not put any exchange through; I just returned the people their money. 529

By Mr. Larkin :

Q. Now you have mentioned the case of Mr. Morgan, where his exchange was returned? A. Yes. The Bank of Montreal, Winter & Smiley. There were a great many. Mr. McLean can give you a list of those.

Q. When was it that these checks were returned? I wish you would mention the list as you remember it now? A. I cannot. 530

Q. You have mentioned the Bank of Montreal? A. Well, those happened to be the bigger men.

By the Special Commissioner :

Q. Did you return any before Monday, the 28th? A. No. You mean on the Saturday?

Q. Yes. A. No.

Q. On Friday or Saturday? A. No.

Q. Did you return any of these checks for exchange that you had negotiated prior to the 28th of October? A. No.

Q. You are sure of that? A. Yes, I think so. 531

By Mr. Larkin :

Q. Well, now, can you remember the dates that these checks, which you say, or drafts, were returned? A. No.

Q. Was it on the 28th or 29th? A. I would not like to say, because that would have to be gone over in the books.

Q. Well, what was the amount of the drafts which were returned to you? A. That I couldn't say.

532 By the Special Commissioner :

Q. The bills of exchange that they sold were returned and the checks that you received—the bills of exchange you sold were returned after you—
A. No, the bills of exchange?

Q. What checks did you return? A. They are checks to pay for the exchange.

Q. But then the Morgans returned the exchange?
A. Yes.

Q. Returned some bills of exchange? A. Yes, returned the exchange, and there was no check passed.

Q. No check passed? A. No.

533

By Mr. Larkin :

Q. Now, you are unable to state the amount of those checks and drafts? A. Yes.

Q. I don't want it accurately, but can you state the amount within \$50,000? A. No, I have not the slightest idea.

Q. Are you able to state how much of these drafts which were sent to Glynn, Mills, Currie & Company in the ten days that you refer to, from the 19th of October to the 29th of October, were cotton bills, or otherwise secured by proper collateral? A. No. I do not know.

534

Q. As a matter of fact, weren't they all drafts drawn by you on Glynn, Mills, Currie & Company— A. Cotton bills would not be drawn by us. They would be drawn by other people.

Q. And purchased by you? A. Yes.

Q. Now, how much of cotton bills purchased by you were sent forward by you in these ten days to Glynn, Mills, Currie & Company? A. That I don't know.

Q. Were there any? A. I don't know.

Q. You don't recollect now whether there were any at that time or not? A. No. I was staying at Tuxedo, and I did not really sign the mail. I left

every day at 4 o'clock, and either Bertie or McLean signed the mail, and I did not pay very much attention to that exchange business. I left it always in the hands of McLean, who was the exchange man. 535

Q. Now, isn't it a fact that the great bulk of the business between your house and Glynn, Mills, Currie & Company, from the 19th day of October to the 29th day of October, represented drafts which you sold in the market here in New York, drawn upon Glynn, Mills, Currie & Company? A. I don't know.

Q. You were selling exchange on London quite heavily in the last ten days, weren't you? A. I 536 don't think any more heavily than usual.

Q. You were selling exchange to Morgan, weren't you? You have just mentioned an incident connected with the sale of exchange? A. Morgan bought some, yes.

Q. Now, Morgan had a house in London? A. Yes.

Q. And they are in the exchange business themselves, aren't they? A. Yes, I suppose so.

Q. And you sold some exchange to the Bank of Montreal? A. Yes.

Q. And they have a house in London? A. Yes.

Q. And they are in the exchange business? A. 537 Yes.

Q. And what other houses, besides these two, are in the exchange business, to whom you sold exchange in the last ten days? A. Well, I don't know. I would have to have the books to see.

Q. Well, now, I want you to look over those books, if you please. Can't you remember any one else? A. (No answer.)

Q. Was your rate of exchange on London more favorable than Morgan's rate of exchange? A. I really don't know. Well, you cannot tell. Ex-

538 change goes up and down all day long. One time it is cheap and the other it is dearer.

Q. Don't you know that during those times you were selling exchange at rates no one else was selling them at in this city? A. No.

Q. Can't you mention any one who was selling exchange on London at more favorable rates than you?

Mr. Sprague: I object to that as immaterial.

The Special Commissioner: Objection overruled.

A. I wasn't following the exchange business myself for the rates. Mr. McLean was doing that, but he always got pretty good rates.

539 Q. Did you allow McLean to operate your foreign exchange department with a free hand without consultation from you? A. Yes. They all have to do that.

Q. You say in order to find out what exchange was sold by you in cash payable at sight on London you would have to refer to some book. Now, what book is it you want to refer to? A. That is that book we had up here yesterday.

Q. What is the name of the book? A. I don't know. It is called the exchange book, I think—outgoing and incoming.

540 Q. Now, of course, Mr. Kessler, the necessities of your house for money had no bearing upon the sale by your house of exchange on London during the last ten days, did it? A. Well, it always had a bearing.

Q. And didn't it have something to do with the question as to whether or not your drafts on Glynn, Mills, Currie & Co. had exceeded the amount of your securities? A. No.

Q. Had nothing to do with it? A. No.

Q. And whether or not Glynn, Mills, Currie & Co. would accept or not had nothing to do with it? A. No. If he had had to cover—

Q. Now, when you say if he had had to cover,

you mean some sum or cash which he did hold in 541
London, as you have explained before? A. Yes.

Q. And therefore you sold these bills of exchange,
payable upon Glynn, Mills, Currie & Co., hoping
eventually or later to secure cover for them—is
that right? A. Yes.

Recess until 2 o'clock.

AFTER RECESS.

ALFRED KESSLER (direct-examination resumed).

By Mr. Larkin:

Q. Now, do you know the amount of bills that 542
you sold on Glynn, Mills, Currie & Co. on October
26th? A. No.

Q. Do you know whether it was \$146,000? A.
No, I do not.

Q. Do you know the amount of bills that you
sold on October 28th? A. No.

Q. Do you know whether it was \$46,000? A. No.
If you had got the figures—

Q. Do you know that on October 29th you sold
\$60,000 of bills, sight drafts, on Glynn, Mills, Cur-
rie & Co.? A. No, I do not know. You have got
the figures there.

Q. Now, can't you refer to the book which is now 543
before you and state the total of sight drafts made
upon Glynn, Mills, Currie & Co.? A. No, I can't
state the total, not without taking half an hour or
an hour.

Q. Can you, by referring to that book, state how
much of these sight drafts were returned by pur-
chasers to whom you gave the checks? A. No, I
could not tell. The books will show that.

Q. Isn't that in that book? A. No; at least I
should not think so.

Q. Now you say that you cannot give that list?
A. No, you have the list there.

544 Q. Well, is this the list (showing papers to witness)? A. Well, I don't know.

(Witness examines the papers.)

The Witness: Yes, that is probably the list.

(List marked Receiver's Exhibit 1 for identification.)

Q. The paper that you have before you represents what, Mr. Kessler? A. It looks as if these are the checks we sold from the 6th of September to the 29th of October. I think this is not the full list of exchange, because here I see the 6th of September—nothing sold during September—until the
545 12th of October—so I don't really know what this list is. These last ones, of course, they seem to be correct.

By the Special Commissioner:

Q. You are now speaking of checks that were returned or of drafts that you drew on London during that period? A. Well, I am telling him——

Mr. Larkin: He is speaking of drafts which he sold on London and which during the last two weeks were presented and payable at sight by Glynn, Mills, Currie & Co. That is what you are speaking about, Mr. Kessler, isn't it?
546

The Witness: Whether they were paid or not? No, because this includes some that were not paid.

By Mr. Larkin:

Q. Or sold by you? A. Yes.

Q. Now, take drafts sold by you on the 23rd, beginning with the 23rd of October, and, from the list, state which of those were sold in the market for cash? A. None of them were sold for cash.

Q. Do you mean to say that of this list beginning with the 23rd of October, that they did not represent purchases from your house for cash—— A. Be-

cause exchange business is always payable the next day. 547

Q. Well, isn't that cash? A. No, it is payable the next day.

Q. Well, is that what you mean to differentiate between cash and the payment for exchange the next day? A. Yes.

Q. Now, go through that list with that explanation, and state whether or not all those accounts on the 23rd of October were not payable in cash the next day?

Mr. McLoughlin: I object to so much of that question as calls for any sales made by Kessler & Company of New York subsequent to the 25th day of October, 1907. 548

The Special Commissioner: The fact that they continued business up to the 29th of October does not hurt you.

Mr. McLoughlin: I think it is quite evident that this examination is being prolonged into an examination into the affairs, transactions, of this bankrupt, of Mr. Alfred Kessler, subsequent to the time when we took possession of our securities, and I think that the time has now arrived when it should be confined to the period prior to that day, the 25th day of October.

The Special Commissioner: Well, I don't know what the object of the question is, but I am quite sure that that does not seem to me to be doing you any harm. 549

Mr. McLoughlin: I cannot see that it does myself.

The Special Commissioner: Then I do not think I will entertain your objection.

Mr. McLoughlin: But it may do us some harm.

The Special Commissioner: I think I will overrule your objection, and give you an exception.

550 Mr. McLoughlin: Exception.

(Question repeated as follows: "Now, go through that list with that explanation, and state whether or not all those accounts on the 23rd of October were not payable in cash the next day.")

The Special Commissioner: From the 23rd down to the 29th, inclusive.

The Witness: Yes, I suppose so. They have got myself as a purchaser. I don't think I bought any exchange.

551 By the Special Commissioner:

Q. Under what date is that? A. That is the reason I am not sure it is correct. This is the 23rd of October, and I don't remember having bought anything——

By Mr. Larkin:

Q. That item that you referred to just now is for \$26.95? A. Yes. Well, Hong Kong, Shanghai Bank seems correct.

Q. How much? A. 1,196 pounds, 14 shillings seems correct.

552 Q. How much? A. 25,000 pounds. Now, these (indicating) I don't know.

Q. Please mention those which you don't know? A. Deviecker, Hoff, Raffleur & Company.

Q. How much? A. 1,196 pounds, 14 shillings and 5 pence.

Q. The next item, F. O. De Luze, how much? A. 272 pounds, 4 shillings and 8 pence.

Q. Lueder & Company, how much? A. 1500 pounds. I don't know; Lueder had some more, I think, but I don't know how much he had. Yes, here he is again. (Indicating.)

Q. Who would know about those three items, if you don't? A. Mr. McLean.

Q. What is the next item? A. E. A. Herman, 9 553 pounds, 15 shillings and 1 pence.

Q. Do you know about that? A. No, I don't.

Q. Do you know about the next item of Siminski? A. I don't know. These are the amounts. I know we owe them something. He did buy drafts.

Q. Well, have you any doubt but that the drafts referred to were purchased by them? A. I suppose that is correct.

Q. And the number of the account was 370, and it is for 317 pounds, 9 shillings and 4 pence? A. Am I supposed to remember the number of the drafts?

Q. Don't you see it is indicated on this list? A. 554 Yes.

Q. Go on and see whether the next one was not sold, No. 371? A. I don't know. Mr. McLean could.

Q. Well, take out those. You do remember yourself about—— A. I don't remember about selling the drafts.

Q. How much do you say it is? A. I don't know how much, but it is not \$700,000. You said just now the drawings were \$770,000, or something like that.

Q. Do you know how much you are short to Glynn, Mills, Currie & Company? A. No.

Q. Then why do you testify that? A. Because it is a bigger amount. 555

Q. Bigger? A. No, smaller, I mean.

Q. How much—\$500,000? A. \$400,000.

Q. Nearly five? A. I don't really know.

The Special Commissioner: Supposing you look over the rest of that list there of drafts other than the Morgan draft, and see if there are any other drafts which you know of your own knowledge were used by your firm at that time, at the dates mentioned there.

556 The Witness: 25,000 Bank of Montreal. Because I know the Bank of Montreal—

By Mr. Larkin:

Q. Well, what date was that? A. The same date, 26th of October.

557 Mr. McLaughlin: I move to strike the answer out to the last question, and to object to evidence as to transactions of this bankrupt with third parties on the 26th day of October or at any time subsequent to the 25th day of October, and, more generally, to any evidence as to the condition of this bankrupt disclosed only by its books of account, and as to which Kessler & Company, Limited, are not only shown to have any knowledge, but could not be reasonably expected to have knowledge.

558 The Special Commissioner: I suppose, Mr. McLaughlin, they are proceeding on two theories. Of course, the Receiver represents the general creditors, and this is a contest between the general creditors, as represented by the Receiver, and Kessler & Company, Limited, whom the Receiver charges as being a preferred creditor. Now, I suppose, to make out their case, it is necessary for them to prove, first, the insolvency of Kessler & Company at or about the time that the transfer complained of was made. That is one thing. And they may not be able to prove that and, at the same time, by the same witness, prove that Kessler & Company, of England, knew about it. But now Mr. Larkin here, as counsel for the Receiver, thinks that this line of testimony is material and important upon the issue of the insolvency of Kessler & Company. I shall admit it and give you an exception. If, when we come to sum up, it will seem to be irrelevant, why, you will call my attention to it, and it is not likely that I shall overlook it.

Mr. McLaughlin: Then it is admitted subject to

a motion to strike out if it is not connected in some way with our client? 559

The Special Commissioner: I am only giving you my general impression, that it might be necessary to prove those two facts. Perhaps I am in error.

Mr. McLaughlin: Exception.

By Mr. Larkin:

Q. Do you know about the one on the 28th of October to the Ocean Accident Guarantee Corporation, Limited? A. I know there was, but I don't know the amount.

Q. The amount you don't know, but you know that the draft was sold in the usual course? A. 560 Yes.

Q. When you say that your account with Glynn, Mills, Currie & Company wound up with a deficit of about \$400,000, did you take into consideration the drafts which Glynn, Mills, Currie & Company returned unaccepted?

Mr. McLaughlin: I object to that question on the ground that the account of this concern with Glynn, Mills, Currie & Company is not a matter of which it is shown my client had any knowledge or any means of knowledge, possible information that we are connected with in any manner whatsoever, and that to attempt to bring out facts here from the books of account of this bankrupt without any effort at all to connect our client with them by showing that our client had any knowledge or means of knowledge of those facts on the day of this alleged transfer, is irrelevant to any issue in this case. 561

The Special Commissioner: I do not think your objection is good. It is overruled.

Mr. McLaughlin: Exception.

(Question repeated as follows: "When you say that your account with Glynn, Mills, Currie & Company wound up with a deficit of about

562 \$400,000, did you take into consideration the drafts which Glynn, Mills, Currie & Company returned unaccepted?")

The Witness: Yes, that would include those.

Q. And you did include that? A. Yes.

Q. Do you know what drafts were returned by Glynn, Mills, Currie & Company? A. No, I have not succeeded——

Q. Then how can you say you took them into consideration if you don't know what were returned? A. Well, just practically guesswork.

Q. Is that the best answer you can make? A. 563 Yes.

By the Special Commissioner:

Q. Haven't you some further information than that? That is no information at all. A. I was not running the exchange business.

Q. How can you say that you took into consideration the drafts which were not accepted if you didn't know that some drafts had not been accepted? A. Well, of course——

Q. Well, did you know or do you know now that some drafts were not accepted? A. When we failed, I knew, of course, that what we had been 564 selling during the week would not be accepted.

Q. You assumed that in your answer? A. Yes.

Q. What do you mean "during that week"? A. That we were cabling over——

Q. The reason in your mind is this, that your failure here in New York on the 30th of October would reach London by cable; is that it? A. Yes.

Q. And would be known there the next day? A. And would be known there the next day.

Q. That the exchange which you had sold during the week of October 29th would not reach London until after the 30th? A. Well, some of it. Yes, after the 30th.

Q. And you assumed that would not be accepted 565
in view of your failure? A. Yes.

Q. And therefore you have made in your mind a
deduction from the whole amount of drafts drawn
during those last few days, and therefore you think
that the amount was about \$400,000? A. Yes.

By Mr. Larkin :

Q. Mr. Kessler, the protection of the account with
Currie had been before you for some days prior to
your assignment, hadn't it? A. No, it had not.

Q. No? A. No.

Q. Don't you remember sending notices to va- 566
rious debtors of yours to send funds direct to Currie
& Company at London? A. Oh, well——

Q. Well, did you? A. No, I don't know that.

Q. You don't know that? A. That would be done
in time.

Q. Was it done within the last ten days or two
weeks? A. That I can't tell you.

By the Special Commissioner :

Q. Did you do it? A. No.

Q. Did you give instructions to have it done? A.
No.

By Mr. Larkin :

567

Q. Do you know whether or not Mr. McLean did
it? A. Well, if anyone did it, of course, it was Mr.
McLean, because he was our exchange man.

By the Special Commissioner :

Q. That is not the question he asked you. You
don't know? A. No.

By Mr. Larkin :

Q. Did he confer with you on that subject at all?
A. No.

568 Q. Now, with the exception of those two items which you have mentioned in this list which has been marked for identification, Mr. McLean can give the further information? Anyone else? A. Yes; because he has received the drafts, for he knows all about it. He was the man who sold the drafts and would know about it.

Q. Wasn't the subject of the rates of exchange a matter of consultation between you and Mr. McLean? A. No. Good Lord, no. Do you mean to say that I and Mr. McLean could dictate the rate of exchange in the market? It changes every five minutes.

569 Q. I asked you whether or not the rate at which you were selling exchange was the subject of conversation between you and McLean? A. No, it was the market rates.

Q. Do you mean to say that when the Bank of Montreal bought exchange of you, you were selling at the same rate as other people in the market? A. Yes.

Q. And Morgan the same? A. Very often at higher prices. Very often I will sell to a bank, perhaps, or others, and buy immediately ten cents better.

570 Q. I am speaking now, Mr. Kessler, not of what you would do ordinarily, but what you did in the last two weeks in which you were in business. Did your exchange account show a loss? A. Exchange account showed a loss.

Q. Do you know how much that account showed a loss of? A. No.

Q. What book would disclose that loss? A. There is no book would disclose that until we get all the accounts in from the other side.

Q. How long did that take? A. Now, then, four months.

Q. You say as a fact that the exchange account did show a loss? A. Exchange account, as a rule,

always shows a loss. The profit in it is very small, 571 and it goes against interest accounts.

Q. Are you able to state how much your account showed a loss in this case? A. No.

Q. Well, I suppose that the object of your being in the exchange business is to make money, isn't it? A. Yes.

Q. You mean to say that there is no money in the exchange business? A. Not very much. At times there is.

Q. Well, if there was no money in it, why did you continue to sell drafts on London and make a loss? A. Because you may make in the exchange business a loss, but make it up in interest. 572

Q. Did you take that into consideration when you said that the exchange account showed a loss? Didn't you allow for the interest which you gained on these transactions? A. No, I did not allow for that.

Q. Then you don't know now whether your exchange account showed a loss or not? A. I know it showed a loss, yes.

By the Special Commissioner:

Q. But you don't mean a net loss after applying the interest gained? A. No. If you should credit that exchange account, for instance, with interest at the rate of 6 per cent., it would shew a profit. 573

By Mr. Larkin:

Q. Who did you collect your 6 per cent. interest from; anybody? A. Well, a lot of people.

Q. Well, who? You sold drafts for exchange and immediately used the money. You didn't get 6 per cent. out of it. It was purely theoretical, your 6 per cent. interest? A. No, we were getting more than six—ten or more.

Q. I am speaking now of the last week you were in business? A. The last two weeks?

574 Q. You actually did not derive any benefit from these drafts which you sold at the rate of 6 per cent.? A. No, if money is at 50 per cent.

Q. I am speaking of those two last weeks. You did not get any interest on the moneys representing the purchase price? A. Yes, on a good deal of it, yes.

Q. Well, now, what? A. Well, you take the McClay account. That was paying us about 15 per cent. The Mill & Turnbull account was paying us about 15 per cent.

Q. That means they ought to have paid you 15 per cent.? A. Yes.

575 Q. You didn't get your 15 per cent.? A. Well, we will get it. They have got lots of goods they can sell at good prices.

Q. You happen to know more about their business than you do about your own? A. I happen to know a good deal about their business.

Q. These securities that Glynn, Mills, Currie & Company had—when were they deposited with them? A. Oh, I don't know.

Q. A long time ago? A. Oh, yes, ever since they started; they had changed a great deal. They have sold some and put others in their place.

Q. Do you know the list of them? A. No.

576 Q. What other house in London was it that you sold drafts on other than Glynn, Mills, Currie & Company? A. The Discount House.

Q. Won't you mention some of the other houses that you sold sight drafts on in London during the last two weeks you were in business? A. Well, I don't know—the last two weeks?

Q. Will you mention some of the houses who were correspondents of yours, with whom you did business? A. Yes. The Union Discount House, the National Discount House, Reeves, Whitbourne & Company, A. Riffer & Sons, the Swiss Bank,

Darien-Kunlich, Discountes Gesellschaft, the Anglo-Foreign Banking Company, Dresdner Bank. 577

Q. Go ahead? A. I think that is about all. There are a few others in London, but I cannot think of them.

Q. It was the practice of these correspondents of yours to render you a statement at the end of every month, wasn't it? A. No. Two or three of the big houses would render a statement at the end of three months, and the others only at the end of six months. Glynn, Mills, Currie & Company sent us a sort of thing every week.

Q. Will you please refer to this exchange book of yours and mention what other houses you had any business transactions between the 21st of October and the 30th other than Glynn, Mills, Currie & Company? A. You mean in London? 578

Q. Yes, in London. A. All the London drafts are all on Glynn, Mills, Currie & Company, so far as I can make out here, except there is a ninety day bill there on Lloyds' Bank.

Q. What date? A. 28th of October—724 pounds ten shillings.

Q. You mean you sold a draft on the 28th of October? A. Yes.

Q. Well, that Lloyds appears on the name of the drawer. Upon whom did you draw it? A. On Lloyds. The drawee, not the drawer. We are the drawer. 579

Q. Yes, you are the drawer. With the exception of that one instance, all the rest of the drafts were drawn upon Glynn, Mills, Currie & Company?

Mr. McLaughlin: You mean London drafts?

Mr. Larkin: Yes.

The Witness: They seem to be all on Glynn, Mills, Currie & Company.

Q. Now, you have stated that Glynn, Mills, Currie & Company had the practice and habit of

580 sending you a sort of statement every week? A. I think it comes every week or ten days.

Q. So that, as a matter of fact, you knew pretty well how you stood every week with Glynn, Mills, Currie & Company—what drafts they had accepted and what you had drawn, and you check the accounts up? A. Well, you cannot tell how you stood here exactly from that account. You can see how you stood on the other side.

Q. Well, you can see how they stood on the other side up to a certain date, and see whether it corresponded with your account? A. Yes.

581 Q. And the only difference would be about those drafts on the way for presentation? A. Some that had not been presented.

Q. You had a list of those on the way and those not presented, so that you knew at any minute how you stood with Glynn, Mills, Currie & Company? A. Yes.

Q. Sight drafts? A. Yes.

Q. You also knew the securities that Glynn, Mills, Currie & Company had? A. Yes.

Q. And you can check up the list of those securities with the prices which were quoted for them on the Stock Exchange? A. Yes.

582 Q. So that you knew just the market value of your securities with Glynn, Mills, Currie & Company at any time? A. Yes, if you wanted to.

Q. Now, you stated that you thought you would go down and meet your cousin when he arrived on the steamer. Do you remember? A. Yes.

Q. How did you know he was coming? A. Because he wrote me he was coming about six months ago.

Q. Have you that letter? A. No, I don't think so.

Q. Well, would it be in the letter files? A. No. It might. There may be a letter in my brother's letter files, where he might have said something,

but I remember I did get a letter from Mr. Henry Kessler saying he was coming, and that must have been last March or April, I should think. 583

Q. After the receipt of that letter, did you write him asking him when he was coming? A. No. I simply——

Q. Did anyone in your office? A. Very pleased to see me when he comes, he said.

Q. Did anyone else in the office either write or cable him as to the time of his coming? A. No.

Q. Are you sure about that? A. Not that I know of.

Q. Not that you know of? A. I don't know.

584

By the Special Commissioner:

Q. When did the firm of Kessler & Company, prior to the bankruptcy, make up their last balance sheet? A. Oh, we only make up once a year; at the end of the year.

Q. And in December, 1905? A. In December, yes, but of course we do not make it up. We make it up for December, but only make it up about April, because we always have to wait for these foreign accounts.

Q. But it dates December 31st? A. Yes.

Q. And that was made up in April, 1907, as of the date of December, 1906? A. Yes.

585

Q. And you have that balance sheet? A. Yes.

By Mr. Larkin:

Q. Where are your balance sheets? A. They are in the private book.

Q. The private book which is inaccessible except to the members of the firm? A. It was until——

Q. Until the assignee took it? A. Mr. Macfarlane took it.

Mr. McLaughlin: That is the attorney for the Receiver. Let us have that on the record.

586 Q. Who wrote up these accounts, these balance sheets, in these private books? A. I did.

Q. And you made the entries after an examination of the condition of the firm? A. In what way? What do you mean?

Q. Who gave you a statement, for instance, of the liabilities of the firm? A. I get them from the books.

Q. Did you get them yourself from the books? A. No, Mr. Brettschneider figured them out for me.

By the Special Commissioner:

587 Q. When he got through with his work, the balance sheet was finished, wasn't it? A. Yes.

Q. You had only to examine it and copy it into your book? A. Yes.

Q. You don't mean to say you made up the balance sheets? A. No.

Q. The balance sheets yourself? A. No.

Q. Are made up in due course by the ex-bookkeeper, with such assistance that he had in the office, and after that statement was completed, which I understand was last April, it was as of date December 31st, and you copied it into your book, which came into the hands of the Receiver—that is right? A. Yes.

588

Q. Or Receiver's counsel? A. Or Receiver's counsel.

By Mr. Larkin:

Q. Now, Mr. Kessler, it was your habit, wasn't it, to carry the securities in which the firm had an interest on the books of the firm at their cost price, wasn't it? A. I want to tell you that—

Q. Well, wasn't it? A. No. Some at cost price and others below.

Q. I am speaking now of the securities in which the firm had an interest? A. No, we used to take

them at the price of the day, except a certain 589
amount of things that we took in the firm at the
time of Mr. Gillett's entry.

Well, when was it that Mr. Gillett came in—
about five or six years ago, wasn't it? A. Five or
six years ago.

Q. Now, I want you, if you please, to point out
in any book that you have any transaction of a
business kind—transaction between yourself and
someone else which resulted in a loss to your
house between the 30th day of October, 1907, and
the 25th day of October, 1907—a period of five
days? What book do you want to refer to?

Mr. McLaughlin: I object to that on the grounds 590
already stated—incompetent, immaterial and ir-
relevant, by reason of the dates mentioned.

The Special Commissioner: I think it may be
material. I overrule the objection.

Mr. McLaughlin: Exception.

(Question repeated as follows: Q. Now, I want
you, if you please, to point out in any book that you
have any transaction of a business kind—transac-
tion between yourself and someone else which re-
sulted in a loss to your house between the 30th of
October, 1907, and the 25th day of October, 1907—
a period of five days? What book do you want to 591
refer to?)

The Witness: Well, you cannot refer to any
books, because if there were a loss it would not
be in the books yet.

By the Special Commissioner:

Q. Now, are any of those transactions there, en-
tered there, between those dates—— A. No loss
to us. No, that would be a loss to other people,
not to us.

592 By Mr. Larkin :

Q. You would be liable for the drafts which were not accepted? A. Yes, if you take it that way. I wasn't thinking of that, though. I was thinking——

By the Special Commissioner :

Q. The question is this—whether your liabilities were increased? That is another form of the question—whether your liabilities were increased by your transactions between and including October 25th and October 29th? You can look at the book or anything else before answering the question, if
593 you desire? A. I don't know. That is very hard to say. The liabilities would not be increased except for the difference in exchange.

By Mr. Larkin :

Q. So that your liabilities, as a matter of fact, were not increased by any loss between the dates that I have given you? A. There were losses in stocks and all that sort of thing.

Q. That is another matter. I am asking you about your liabilities, as the Referee put it—your liabilities? A. That is a sort of thing we would have to work out and take our own time.

594

By Mr. Larkin :

Q. Well, you stated just now that your liabilities would not be increased except by the difference of exchange, which might have gone against you. Was that a correct statement? A. You are referring to this book?

Q. Did you make that statement just now? Didn't you state just now that that was so? A. Yes.

Q. Is that correct or not? A. Well, no, because there were other businesses we were in, too.

Q. Well, why did you state it if it was not correct? A. I don't know. 595

Q. Well, now, Mr. Kessler, isn't it true that your liabilities were not increased by any losses between those five days?

Mr. McLaughlin: I object. That has been put two or three times.

Mr. Larkin: Yes, and been answered two or three times.

Mr. McLaughlin: I would like to know what Mr. Larkin means by the question, "Were your liabilities increased by a loss"?

The Special Commissioner: I think if you put your mind on it you can determine it. 596

Mr. McLaughlin: The witness has answered whether his liabilities were increased or not.

The Special Commissioner: The question is not very satisfactory, and I am not quite sure that the witness himself is satisfied with his answers, and I should prefer to have the question repeated, and give him another opportunity to answer.

(Question repeated as follows: Q. Well, now, Mr. Kessler, isn't it true that your liabilities were not increased by any losses between those five days?)

The Witness: Well, I cannot tell. I have not gone into the books or anything. The books were taken away from me, and I have not been able to look at them. 597

By the Special Commissioner:

Q. You mean to say, Mr. Kessler, you think it would involve an examination of your affairs and your books to answer the question correctly? A. I was, on the 25th, Friday—I was away on Saturday, practically, in the afternoon, on Sunday, and then Monday this affair began, and so really I have

598 not seen the books, and if you show me the books—
I don't know for those five days.

By Mr. Larkin:

Q. What books would you have to refer to to answer that question? A. Well, I would like to have a statement made out and see how the different things stand on the 25th, and then how they stand on the 30th. In that way I could tell.

Q. If you had suffered a loss of any kind, and substantial loss, isn't it possible that you would have remembered it now? A. Well, I suffered a loss——

599 Q. I am not speaking now of the securities, the assets. I am asking you whether——

The Special Commissioner: You are mixing up the two things. You are asking him whether his liabilities were not increased.

Q. Stick to your liabilities, and state whether, if you can, you now can remember whether you increased your liabilities within those dates, except for the difference of exchange? A. No, I don't think there is, except the exchange.

Q. And are you able to state about what the loss was on the matter of exchange? A. No, I can't tell that.

600

Q. Are you able to tell roughly? A. No, it would be very hard.

Mr. McLaughlin: I would like to know, Mr. Referee, whether we are talking about increased liabilities or losses?

The Special Commissioner: Increase of liabilities, as I understand it.

Mr. McLaughlin: I don't think the witness understands.

The Special Commissioner: Well, I should think he ought to.

The Witness: It would be increased, but the exchange was returned, and— 601

By the Special Commissioner:

Q. You mean to say that all those were withdrawn? What do you mean by "returned"? A. No, on the 29th and 30th they had been returned.

Q. No, you mean to say those bills of exchange that are there under the date of the 29th—there were not any on the 30th, were there? A. 29th.

Q. And those bills of exchange entered there on the 28th and 29th were all withdrawn? A. I think so; I think they were withdrawn. Mr. McLean can tell you, but I think it was on the 29th everything was withdrawn. 602

Q. You think that is true of the bills drawn on the 28th? A. That I cannot tell. Yes, on the 28th, too, I should think, by some of these entries here—the 28th and 29th.

Q. Both withdrawn? A. I think so.

Q. You did not draw any on Sunday? A. No.

Q. Then the only days to be— A. Would be Saturday.

Q. And the 25th, because they were inclusive—25th and 29th, inclusive? A. Yes.

Q. By "withdrawn" you mean cancelled? A. I think so. We returned the checks. I see one here that I know we returned. That is in the middle of the 28th. 603

Q. Now, the 26th? There were none drawn on the 26th? A. No.

By Mr. Larkin:

Q. Then you say there were no drafts drawn on the 26th. Had you intended by that statement to cover cables, which was a cash transaction? A. No, I did not cover cables.

Q. You did not intend to cover cables? A. You are talking of drafts?

604 Q. On the 26th you cabled what—how much money? A. 200,000 francs.

Q. Upon whom? A. Lazard.

Q. That is, to the order of Lazard Freres, upon whom it was drawn? A. Dreyfus, to the order of Lazard Freres.

Q. Now, I want you to take that list which you have before you, and point out—

By the Special Commissioner :

Q. Did you have a balance with Dreyfus? A. I could not tell you.

605 Q. What would that entry indicate that you made—a cable transfer from Dreyfus to Lazard, 200,000 francs, wasn't it? A. Yes.

Q. That is what it indicates? A. Yes.

Q. But personally you do not know about the transaction? A. No.

By Mr. Larkin :

Q. You mean—how much did you owe Dreyfus at that time? A. I cannot tell.

Q. Do you know how much you wound up, at the time of your assignment, by owing him? A. No.

606 Q. Do you know it is between four and five hundred thousand dollars? A. Those are the long drafts you are talking about.

Q. I am asking you how much you wound up by owing him at the time of your assignment. Do you know that? You can say yes or no? A. No.

Q. Do you know whether it is a substantial amount? A. No. We generally—we never overdrew more than 300,000 francs.

Q. Well, did this matter of the drawing of drafts on Paris go under Mr. McLean's hands? A. Yes, Mr. McLean's.

Q. Then, as a matter of fact, you don't know how much McLean drew on Dreyfus? A. No.

Q. So that it might turn out that Dreyfus' claim against you is for a million? A. It might be. 607

Q. Now, I want you to take the list from the book and see the people to whom you sold drafts which were subsequently returned and to whom you redelivered the checks. You mentioned one just now as having been returned. Will you please look it over and see if you cannot find somebody else?

A. I did not attend to the business, and it is very difficult.

Q. What was the business that you did attend to? What was your special field? A. Everything, anything. My chief things were the dry goods accounts, which I was working up for the last month or two. 608

Q. The dry goods accounts? A. Yes.

Q. So that you cannot tell more than one of these? Which ones do you recollect? A. Bank of Montreal I recollect, and I recollect Winters & Smiley.

Q. What do you recollect about those two transactions? A. That I returned the checks to them.

Q. Do you remember the dates that you returned the checks? A. No.

Q. Well, don't the books show when you sold the draft? A. The books show when we sold the draft, yes.

Q. What day does the book show you sold the draft? A. Well, here it is—the 28th. 609

Q. Well, now, according to the custom, you got the check the next day. That would make it the 29th? A. Yes.

Q. Any doubt in your mind but that you returned it on the 29th? A. I don't know whether I returned it the 29th or 30th. I returned it, I think, altogether, on the 30th. I am not sure.

610 By the Special Commissioner :

Q. Mr. McLean had charge of that? A. Yes, he had all the checks in his charge.

Q. He would know all these things? A. Yes.

By Mr. Larkin :

Q. Now, the result was that Mr. McLean came to you with a bunch of drafts in his hand, and asked you what to do with them on the 30th, and you said to return them? A. No.

Q. Didn't he come to you with a bunch of checks? A. I saw him—I saw a lot of checks in his hand.

611 Q. Did he ask you what to do with them? A. No.

Q. You mean to say he returned these of his own motion? A. No. He and I thought we had better return them. We thought it was no use making people suffer more than we could help it.

Q. I just want to find out whether it was the subject of conversation between you and McLean that made you return these checks, or whether he did it of his own motion? A. No, I proposed it to him at the time.

612 Q. Now, Mr. Kessler, I want you to state to the Referee, if you please, and point in the book, if you can, any transactions which made your condition different on the 30th of October, 1907, than it was on the 25th of October, 1907. Now what books do you want to refer to? A. Well, I can only say that——

Q. Do you want to refer to any books? A. No; no books to refer to.

Q. Why do you say there are no books you want to refer to? Don't your books show what your liabilities were and what your assets were? A. No, not unless the books are closed.

Q. Haven't you a stock and bond account? A. Yes.

Q. Don't they show what stocks and bonds you sold on the 30th of October, as well as on the 25th? 613

A. But I have not calculated to see what they are worth. I have an idea.

Q. I didn't ask you for your idea. Will you please point out what elements of difference there were between your condition on the 30th day of October, 1907, and the 25th day of October, 1907?

A. The chief element of difference was I expected to be able to get money from Gillett and also from Flinsch's friends in Europe, and I did not get it, and I also had hopes of getting money from Morgan or some one, which would have enabled us to continue business, and there would have been no trouble. 614

Q. Other than that, there was no difference, as I understand it? A. Well, there were things to be written on, or written down, and the man died and left me in there for \$20,000.

Q. Who was the man? A. J. W. Baker.

Q. Where was it he died? A. He died shortly before that, and I heard——

Q. Shortly before? You mean by that a couple of months before, or six months? A. No, not as long as that.

Q. One month? A. About one month, oh, I guess.

Q. What did you hold, a note of his? A. No, old securities. 615

Q. Those securities were collateral to a loan? A. Yes. Not a loan, no; we held securities.

Q. I understand that you held his securities—is that it? A. We bought and sold securities for him, and he did not put up margins.

Q. And does that account appear under his name in the books? A. Yes, it appears in the books.

Q. Under the name of J. W. Baker? A. Yes.

Q. Did you say that this Baker transaction resulted in a loss of about \$20,000 and that occurred

616 about a month prior to that 25th of October? A. But the loss was not there until the stocks began to go down very much lower.

Q. About a month prior to the 25th day of October? A. I believe so, yes.

Q. And you subsequently sold out his collateral? A. I did not sell out his collateral.

Q. Then you had not sold out his collateral? A. No.

Q. The collateral is still among the assets of the concern, is it? A. Yes.

Q. So that, as a matter of fact, you don't know whether there is a loss or not? A. No, I think
617 if we can hold on there will not be any loss.

CROSS-EXAMINATION BY MR. McLAUGHLIN:

Q. Did you know, on October 25th, what the value of the assets of Kessler & Company of New York were?

Mr. Larkin: I object to that.

The Special Commissioner: Why?

Mr. Larkin: Because he is bound to know what was his condition at that time; constructively bound to know. A man cannot be in the business of banking and say, as an excuse for a certain condition, that he didn't know what his condition was.
618 It might be material in a criminal proceeding, but to know. A man cannot be in the business of banking in a proceeding of this kind I think his answer is incompetent.

The Special Commissioner: I will take that testimony, but I will reserve the right to you to strike it out.

Mr. Larkin: I take an exception at the present time.

The Special Commissioner: Yes.

A. No.

619

Mr. McLaughlin: I now offer in evidence—I assume under stipulation with Mr. Larkin—the entire correspondence between——

Mr. Larkin: I would not say “entire correspondence.” “Correspondence.”

Mr. McLaughlin: What purports to be a copy of the correspondence between Kessler & Company of New York and Kessler & Company, Limited, of Manchester, from June 30th, 1903, down to and including the 25th day of October, 1907.

Mr. Larkin: I do not object to it because they are copies, but I object to counsel stating that it is the entire correspondence.

620

The Special Commissioner: He withdrew it. He does not state it is the entire correspondence—it purports to be a copy of correspondence.

Mr. Larkin: A copy of letters passing between the two houses?

The Special Commissioner: Not cables?

Mr. McLaughlin: Just letters.

The Special Commissioner: You prefer “letters” to “correspondence?”

Mr. Larkin: Yes, sir.

Received in evidence and marked “Kessler & Company, Limited, Exhibit A.”

Q. I show you the original letter, dated June 30th, 1903, from your firm to Kessler & Company, Limited of Manchester, and ask you whose signature that is and whose handwriting the signature is to, if you know? A. Mr. Flinsch’s, my partner.

621

Mr. McLaughlin: I offer that in evidence.

The Special Commissioner: Any objection?

Mr. Larkin: No, sir.

Received in evidence and marked “Kessler & Company, Ltd., Exhibit B.”

Q. Your attention has been called, since your firm made the assignment, to the correspondence

622 which passed between your firm and Kessler & Company, Limited, of Manchester, hasn't it? A. Yes.

Q. Your attention was directed to that correspondence by me, wasn't it, at one time? A. Well, I don't know who was the first. Mr. MacFarlane I remember asked me for the private book, and he took the books away—or we read them through at first—and then we had copies made, and then he took out the letters in the private book I received, but he did not take my letters.

623 Q. Do you remember my asking you for the copies of the letters which you had written to Kessler & Company, Limited, of Manchester? A. Yes, I do.

Q. And asking for everything that related to this escrow? A. Yes.

Q. As far as you know, you have produced a copy of every letter that you sent to Kessler & Company, Limited? A. No, I found two other letters. I found one at home.

Q. Will you produce those letters at the next hearing? A. I can, yes; I will.

Q. Have you copies of cables which you sent, or original copies which you received from Kessler & Company, Limited? A. In regard to the escrow?

624 Q. In regard to the escrow. A. There are none.

Mr. McLaughlin: Now, I ask that it be stipulated on the record now, in regard to this correspondence, that it is a correct copy of so much of it as has been turned over by Mr. Kessler to the Receiver.

Mr. Larkin: Well, I am willing to make such a stipulation, subject to correction. For instance, there may be clerical errors in here that I know nothing of now, but I will agree to it otherwise.

Mr. McLaughlin: I will state further, Mr. Referee, that we have the originals of all Kessler

& Company's letters here, subject to Mr. Larkin's 625 examination.

The Special Commissioner: On the other hand, I take it any letters of Kessler & Company, Limited, that you have will be produced in the same way?

Mr. Larkin: We have some few; yes.

Q. Will you look at the letter dated June 30th, 1903, addressed by your firm to Kessler & Company, Limited, and state, if you know, whether the securities therein mentioned were placed in a separate package in your safe deposit vaults and marked as stated in that letter at about that time?

Mr. Larkin: I would like to have the Referee instruct the witness that the question calls for his personal knowledge of the matter. 626

By the Special Commissioner:

Q. This is your personal knowledge? A. My personal knowledge could not count for anything, because I happened to be over in England with my brother at the time.

Q. Who is that letter of Kessler & Company signed by? A. Mr. Flinsch. Bacon would probably know most about it, because he attended to the whole thing.

Q. Is Bacon here? A. He is with Kissel, Kinnicut & Company. 627

By Mr. Seymour:

Q. You mean Mr. Horace Bacon, do you not? A. Yes.

By Mr. McLaughlin:

Q. Were you here in New York on the 27th of August, 1907? A. 1907?

Q. Last August. A. Oh, this August? Yes, I was in New York in August.

628 By The Special Commissioner:

Q. You were? A. Yes. This year?

By Mr. McLaughlin:

Q. Yes, this year. A. Yes.

Q. I show you your letter to Kessler & Company, Ltd., dated August 27th, 1907, and ask you to read it and state, if you know, whether the securities therein mentioned were set aside by you at that time?

Mr. Larkin: You understand that this is your personal knowledge that is asked for?

629 The Special Commissioner: Yes. A. Well, I know that the first we did sell——

Q. Never mind about that part. About the second part, about the escrow? A. Yes, I know all about that.

Q. Did you personally set aside the securities therein mentioned? A. No, Mr. McGee got them, but I put them all down.

Q. You wrote them down? A. I wrote them down.

Q. Did you have anything to do with separating them in any way or placing them in the vault? A. No.

630 Q. Who did? A. Bertie Kessler, probably—— either Mr. McGee or Bertie.

Q. Did you afterwards see those securities in your vault in the North American Safe Deposit Company? A. No, because I have not been in the vault for a long time.

Q. So that you have no personal knowledge as to whether these securities under these two escrows were actually placed in a separate package and marked as dated and set aside? A. No, no personal knowledge, except that we had——

Mr. Larkin: No, never mind the exception; had no personal knowledge. That answers it.

Q. Did you ever see the securities contained in the escrow that was, on June 30th, 1903, at the safe deposit vaults? A. Yes, I have. I have seen them all. They have counted them over, I think, twice or three times since they were originally put in. 631

Q. Were they in a separate package? A. Yes.

Q. Were they marked or endorsed in any way?

A. Yes, they were marked.

Mr. Larkin: Now, do not answer what they were marked; just answer yes.

Q. Now, how were they marked?

Mr. Larkin: I object to that. The question was whether the witness knew that these securities were put in a separate package or whether that package was endorsed with any marks. I object to it on the ground that the envelope—— 632

The Special Commissioner: I understand him to say he was never in the vault.

The Witness: This is the original letter we have gone back to now.

The Special Commissioner: The original letter?

Mr. McLaughlin: The original escrow.

The Special Commissioner: Of the 30th of June, 1903?

Mr. McLaughlin: Yes, I asked him whether, at any time he had been in the vault and seen those securities contained in that first escrow, and he said he had. I asked him whether they were in a separate package and he said yes. I asked him if they were marked and he said yes. I now ask him what that mark was. 633

The Special Commissioner: That is not of any consequence to you or anybody else. It is objectionable because you should produce it or notify them to produce it. This witness says he went there and he checked off these securities. I understand him to mean by that that he personally examined them,

634 went over them and found that they were there. Is that your testimony?

The Witness: I have counted them, yes, twice, I think, since they were originally put there.

The Special Commissioner: Now, what the mark was on there is not of any consequence, and, if you want to prove it, that is a matter that is not collateral. That is a matter bearing right on the issues, and you will have to produce these papers, if it is important for you to produce it, or notify them to produce it.

Mr. McLaughlin: It is in our possession under the injunction of the Court.

635 The Special Commissioner: You cannot part with it, but you can produce it in court.

Mr. McLaughlin: The injunction is that it restrains us from moving them from where they now are.

The Special Commissioner: It may have some bearing that I don't know. I should not suppose that it was of any consequence. If it is, you can produce it here.

By Mr. McLaughlin:

636 Q. Assuming that Exhibit A is a correct copy of the correspondence between your firm and Kessler & Company, Ltd., which you have furnished to the Receiver, does that exhibit contain all of the correspondence between your firm and Kessler & Company, Ltd., in relation to the escrow of June 30th, 1903, and the special escrow of August 27th, 1907?

Mr. Larkin: I object to that question—assuming what he knows.

Mr. McLaughlin: We are assuming that is stipulated.

The Special Commissioner: You have a right to show, Mr. McLaughlin, so far as he had personal knowledge of it, whether he had any other correspondence, but that question is too wholesale. You

should approach the subject in a different way, and, 637
under their objection, I will sustain it.

Q. Do you know of any other correspondence between your firm and Kessler & Company of Manchester relating to this escrow and this special escrow? A. I think you have all the copies from me to Manchester or from the firm of Kessler & Company here to Manchester, but I don't think you have all the copies of the letters of Kessler & Company, Ltd., to Kessler & Company, of New York.

Q. And, so far as you know, does this correspondence—

The Special Commissioner: He says he thinks 638
that they do not have all the letters from Kessler & Company, Ltd., to Kessler & Company, of New York.

The Witness: No.

The Special Commissioner: That is what you said, wasn't it?

The Witness: Yes.

The Special Commissioner: So that is not the complete correspondence.

Q. You stated that you saw a few of the original letters received by you from Kessler & Company, Ltd., were missing? A. Were missing.

Q. Were missing? A. Yes.

Q. Can you state about how many letters are missing? A. No, I suppose three or four. They were nothing but acknowledgments of receipts, however, or, rather—

Mr. Larkin: I object, now. I move to strike out his answer.

The Special Commissioner: Yes, that motion is granted as to what the contents of these letters were.

Q. How do you know that these two letters are missing? A. Because, when I handed them over to

640 Mr. MacFarlane, he said that there were some missing, and I said yes, I know, but then they came in, probably, in my private letters, or something, or they, being only acknowledgments——

Mr. Larkin: I move to strike out what they were.

The Special Commissioner: Do not characterize them.

By the Special Commissioner:

Q. What they are trying to find out now is whether there are any such letters and what became of them? A. What there were, I threw them out. I did it myself, three or four—they just stated——

641

Mr. Larkin: Now, do not state what they said.

The Special Commissioner: They object to your stating the contents.

By Mr. McLaughlin:

Q. In other words, certain letters which are referred to in the copies of your letters and indicated in those copies are missing from your files, is that the idea? A. Yes.

Q. With the exception of the few omissions to which you have just referred, do these letters contain a complete and accurate statement of your dealings with the securities contained in these two escrows?

642

Mr. Larkin: I object to that, that is a very broad question.

The Special Commissioner: Yes.

(Question withdrawn.)

Q. I call your attention to letters of January 20th, 1904, Kessler & Company, Ltd., to your firm, the last paragraph, and I ask you if that instruction was followed by you, and if you did advise

Kessler & Company, Ltd., forthwith of any variation in the deposit of securities. A. I don't know, because I don't remember on that day whether I sold any securities or whether I made any change. 643

Q. The letter refers to the ensuing year—the course of dealings. Have you given the best answer to that you can? A. Yes; we were making changes all the time, and I don't know whether we made a change just on that date.

Q. That is not the question, Mr. Kessler. I asked you if, when you made a change during that ensuing year, you notified Kessler & Company, Ltd., of Manchester, forthwith of that change? A. Oh, yes, always. 644

Mr. Larkin: I object to the witness putting in the word "forthwith."

Mr. McLaughlin: It is in the letter.

Mr. Larkin: That does not make any difference; it may not be the fact.

By the Special Commissioner:

Q. Do you know that you notified him from time to time forthwith, which means immediately, upon the changing of the securities? A. Within a day or two. Now and then I might make a change on the Saturday and notified them on the Tuesday. 645

Q. You notified them by mail? A. Yes.

Q. Nothing was done by cable? A. No.

Q. Those letters would show, that you have here, what changes were made? A. The letters would show, yes.

By Mr. McLaughlin:

Q. Referring again to this letter of June 30th, 1903, was the amount of your long drawings against Kessler & Company, Ltd., at that time fixed?

646 Mr. Larkin: Well, now, I want the witness to state if he knows of his own personal knowledge about it.

The Special Commissioner: He means by that did you have any conversation—I suppose he—with Kessler & Company?

The Witness: I think the arrangement was at one time 80,000 Pounds, and then we went up to 110,000 Pounds, and then went back to 80,000 Pounds.

By the Special Commissioner:

647 Q. That was all done by word of mouth, wasn't it? A. Yes, and in private letters, perhaps, from my brother to me.

Q. It is not included in this correspondence? A. It would not be in there, I know.

Q. It is not, as a matter of fact? A. No.

Q. You have looked them over? A. No.

Q. Then it either occurred by some oral conversation or agreement arrived at by means of oral conversation, or by some other correspondence than what you have here? A. (No answer.)

By Mr. McLaughlin:

648 Q. You were in England at the time this letter was written, were you not? A. In 1903, yes.

Q. Did you have any conversation with any members of Kessler & Company, Ltd., in regard to the matter referred to in this particular letter?

Mr. Larkin: I object to that letter, if the Court please, in regard to any conversation that was had between the house in Manchester and the New York house prior to the writing of this contract or this arrangement in the letter.

By the Special Commissioner :

649

Q. When was it? When did you have the conversation? A. Well, it would have been that year when I was over there.

Q. Well, as regards the 30th of June, 1903, was it before or after? A. It was before.

Q. How long before? A. That I don't know. I cannot tell when I arrived over there.

Q. You mean to say you had no consultations with them after the 30th of June in respect to this general transaction? A. Not that I remember.

Q. When did you arrive in England that year? A. I think I went over in March or April, and came back here in August.

650

Q. And were in England during what period? A. Well, I was not in England much. I was yachting in Norway.

Q. I want you to tell us, if you can, during what period of time you were in England? A. I would have been in England the first two weeks after my arrival and probably the last two weeks before I sailed.

Q. And you sailed what time? A. Well, I really don't know.

Q. You stated you returned—— A. I think it must have been about April, March, to August, that I was away. It would have been four months. It would not have been five months.

651

By Mr. McLaughlin :

Q. Can you state whether or not the matters referred to in this letter of June 30, 1903, were arranged by you in behalf of your firm while you were in England? A. They must have been, and it was because we had lots of letters before that saying, "We must insist on having collateral on doing that business."

Mr. Larkin: I move to strike out, if the Court please, that answer.

652 **The Special Commissioner:** I will grant the motion to strike out, and let you take an exception.

Q. What was the amount of the limit of your long drawings on Kessler & Company limited on June 30, 1903, the date of this letter? A. I suppose at that time it was eighty thousand pounds.

Mr. Larkin: He supposes, your Honor. I move to strike out his answer.

(No ruling.)

By the Special Commissioner:

653 Q. Well, haven't you got any books that you can refer to? A. I have got my private books, but I don't think——

Mr. Larkin: I move to strike out his answer.

By the Special Commissioner:

Q. Have you any present recollection of what that amount was at the time—June 30, 1903—your present recollection? A. Eighty thousand pounds.

Q. That you recollect? A. Yes. It was later on. It was later on it was raised.

654 By the Special Commissioner:

Q. Is that ninety days after sight?

Mr. McLaughlin: Yes, sir.

By the Special Commissioner:

Q. Or ninety days from date? A. Ninety days.

Q. That would fall due when? A. About November 10.

Q. So that would fall due after your assignment—that draft? A. Yes.

By Mr. McLaughlin:

655

Q. Do you know whether that draft was accepted by Kessler & Company, Limited, of Manchester?

Mr. Larkin: I object to it unless he knows of his own knowledge.

The Special Commissioner: Objection sustained.

The Witness: What am I to answer?

Q. Whether you know? A. I don't know.

Q. Will you refer to your exchange books and tell me whether your firm drew a draft on Kessler & Company, Limited, on August 27, 1907? A. Yes—twenty thousand pounds, to the order of J. & T. Coats & Company, Limited.

656

Q. When is it payable? A. That was a sixty day draft. That would be payable about the 8th of November, somewhere around there.

Q. Your firm never remitted funds to Kessler & Company, Limited, to cover that draft, did they, Mr. Kessler? A. No.

Q. At the time of your assignment on October 30th, was this draft one of the future obligations that you had to provide for?

Mr. Larkin: I object to that. That is another question in the same form.

The Special Commissioner: Objection sustained.

Mr. McLaughlin: Exception.

657

Q. In the usual course of business, would these drafts of August 27, 1907, have been returned to you prior to October 30, 1907, if it had not been accepted?

Mr. Larkin: I object to that question.

The Special Commissioner: I will allow that.

The Witness: It would not be necessarily returned to us. It would have been returned to the Spool Company or the Spool Cotton Company would have probably retained the draft, expecting to get the money for it in a few days. Very often a draft will

658 be sent abroad and does not come back for a long time. We have drafts here that were drawn and we have presented them for acceptance, and they are not accepted at once, but they say they will pay in a few days or a week or ten days, and then we cable to the other side and find out if we are to have it protested or to hold them, and we generally hold them, so it would not necessarily come back.

Q. Would you in the regular course of business be notified at once by a person on whom you had drawn such a draft in the event of non-acceptance?

A. Yes, we would receive a cable—an acceptance—draft number so and so, not accepted.

659 Q. Did you receive such a cable in regard to the draft of July 31, 1907, to which you have testified?

A. No.

Adjourned to December 3, 1907, at 11 A. M.

New York, December 3, 1907, 11 A. M.

Met pursuant to adjournment.

Same appearances, and Mr. Semple.

660

ALFRED KESSLER, cross-examination resumed.

By Mr. McLaughlin:

Q. Mr. Kessler, I ask you to refer to your foreign ledger L, at folio 499, the long account of Kessler & Company, Ltd., and ask you if, by referring to that account, you can state whether, on or about the 31st day of July, 1907, you sold a draft, 90 days sight, 10,000 Pounds, on Kessler & Company, Ltd.?

A. The 1st of August there was—four times 2,500 Pounds—yes, 10,000 Pounds.

Q. That entry would be made in the ledger the day after you drew the draft, wouldn't it? A. Yes, the day of the sailing of the steamer. 661

Q. Did your firm get the money for that draft? A. Yes, we received the money for that draft.

Q. And it went into your business? A. It went into the business.

Q. Will you tell me by reference—did you credit Kessler & Company, Ltd., account in your ledger for the amount of that draft on the day you drew it or the day after you drew it?

Mr. Larkin: I object to it unless the witness knows. The book itself would be the best evidence.

Mr. McLaughlin: We are examining the witness with respect to his own books. 662

Mr. Larkin: Yes, but that does not make any difference.

Mr. McLaughlin: That does not make any difference?

Mr. Larkin: Yes, I think it does.

By Mr. Larkin:

Q. Whose handwriting is that entry in? A. The bookkeeper's.

Q. Did you have any personal knowledge of the transaction at all except that you see it in that book? A. Well—I can't say that I have. 663

Q. Did you know about it—you see an entry of it in that book? A. I know how it is done.

Q. But you haven't any recollection of the transaction? A. Well, I have a recollection, yes. The exchange matter is done by McLean, and the entries are made by the bookkeeper.

Mr. Larkin: I don't think he can state, your Honor.

The Special Commissioner: You must prove the books in the regular way.

664 By Mr. McLaughlin:

Q. Did your firm keep correct books of account?

A. Yes.

Q. Is this book which is shown you now the ledger which was kept by your firm? A. The ledger, yes.

Q. I now ask you if, the day following the day you drew that draft, you credited in your ledger the account of Kessler & Company, Ltd., with the amount of that draft.

Mr. Larkin: I object to it.

Q. I ask you to refer to your ledger in making
665 your answer.

Mr. Larkin: I object to it on the ground that the witness does not know anything about it.

The Special Commissioner: Objection sustained.

Mr. McLaughlin: Exception.

The Special Commissioner: You want to prove the books by the bookkeeper. You want to first call the bookkeeper and prove that he made correct entries; that he would not have made them unless they had been correct. You cannot prove it that way. That is not the regular way.

Mr. McLaughlin: I understand your Honor, then, to make the ruling that this witness——

666 The Special Commissioner: I merely make that suggestion for your advantage. I merely rule that the objection is good, and you have an exception.

Q. Can you tell me what day that particular draft drawn on July 31st, 1907, matured?

Mr. Larkin: That is the same objection in the same way.

By the Special Commissioner:

Q. You only know from what the entries are in the books? A. It would be impossible to keep all those dates in my head.

Q. As a matter of fact, you don't know about 667
that draft, except you see the entry in the book? A.
Well, I—I signed the draft.

Q. Then you have a recollection of it? A. Yes,
of the drafts.

Q. Of that particular draft? A. Yes.

By Mr. Larkin:

Q. You have a present recollection that you
signed the four drafts on the 31st of July, 1907?
A. No, not that date, no.

Mr. McLaughlin: Does your Honor sustain that
objection?

The Special Commissioner: Yes, I sustain it.

Mr. Laughlin: I take an exception.

668

By Mr. McLaughlin:

Q. I show you a letter dated August 13th, ad-
dressed to your firm and signed "Kessler & Com-
pany, Ltd.," and ask you if that letter was received
by you, and, if so, about when it was received?

Mr. Larkin: Did you give the date, Mr. Mc-
Laughlin?

Mr. McLaughlin: I did.

Mr. Larkin: What date is it?

Mr. McLaughlin: August 13th.

669

By the Special Commissioner:

Q. What is it? A. The Manchester correspond-
ent.

Q. A book from Manchester? A. No; our copy
book here. We have our letters to them, and then
their letters to us.

Q. Put together? A. Put together.

Q. Now, what letters do you identify—what
date? A. The 13th of August.

Q. A letter from Kessler & Company, Ltd.? A.

670 Yes, of Kessler & Company, Ltd. We received it on the 22nd of August.

By Mr. Larkin:

Q. Is that letter in the file correspondence that you put in evidence yesterday? A. Well, I know——

Mr. McLaughlin: No, is it in the general files?

The Witness: No, it is in the general files. Those that you have are the private.

By Mr. McLaughlin:

Q. The correspondence we put in only relates to the escrow. These are the day to day transactions
671 between the two firms.

The Witness: Do you want me to read it?

Mr. McLaughlin: Yes.

Mr. Larkin: Just let me see it first.

The Special Commissioner: Do you offer it in evidence?

Mr. McLaughlin: I offer it in evidence, yes.

The Special Commissioner: Let the counsel look at it first.

Mr. Larkin: I would like to ask him one or two questions first.

The Special Commissioner: Yes.

672 By Mr. Larkin:

Q. The files of correspondence in which this letter of the 13th of August, 1907, was, represents correspondence passing between the Manchester and the New York houses? A. Yes.

Q. And is the correspondence which was found by you in the business files of your house? A. The business files.

Q. And the copies of letters received are copies——

The Special Commissioner: The original letters are there, I understand?

By Mr. Larkin:

673

Q. They were received from the Manchester house and are filed in the ordinary course of your business in the files of your house? A. Yes.

Q. You have copies of letters in here—those are copies of letters sent to them and are kept by you in this file? A. Yes.

Q. Now, those letters which were put in yesterday are what you call your private letters? A. Yes.

Mr. Larkin: Well, now, I object to this.

The Special Commissioner: Why?

Mr. Larkin: Because the only point of its introduction is in an effort to prove by the writing—the letter of Kessler & Company—that they have accepted four certain drafts. 674

The Special Commissioner: You cannot prove it in that way.

Mr. Larkin: I object to it.

The Special Commissioner: It may be of some importance to show that they got a notice of that kind. A letter may sometimes be evidence of the fact that it was sent and received, while the contents of it may be irrelevant and incompetent. I think the contents—to prove what they show is incompetent. 675

Mr. McLaughlin: If your Honor pleases, cannot we show—might not be able to show it all by this witness, but, if taking this letter in connection with the books of account of this bankrupt—

The Special Commissioner: What is your purpose in offering that letter in evidence?

Mr. McLaughlin: Our purpose is to connect it subsequently with the entries made in the books of account at the time it was received, and if the Receiver in this proceeding is not bound by the books of account of this bankrupt, standing in the shoes of the bankrupt, it is difficult to see how we can

676 prove any facts relating to our business dealings with the——

The Special Commissioner: He is bound here by the books—the Receiver is bound by the books? That is another question. That has nothing to do with that letter.

Mr. McLaughlin: It may have a great deal to do with it.

The Special Commissioner: No. I have suggested to you, and you know full well that it is perfectly easy for you to prove those books.

Mr. McLaughlin: Does your Honor wish me to suspend the cross-examination of this witness now?

277 The Special Commissioner: I have no wish in regard to it, except not to take incompetent evidence. I have suggested to you how the books could be proved. It is not necessary for you to prove the letter in order to prove the books, and, if the object of the letter is to show that they did actually accept those drafts—just consider for a moment. You are asking me to receive the unsworn declaration of a party that a certain fact is so. That is all that letter amounts to.

278 Mr. McLaughlin: Not at all, your Honor. We are attempting to prove here a draft was accepted by a transaction between Kessler & Company, Ltd., and Kessler of New York, in the regular course of business, which amounts to an account stated between the parties, and by this letter that these drafts have not only been accepted, but have been debited to the account of Kessler of New York. We shall show subsequently that this was followed by a book entry made by this bankrupt, whom the Receiver represents, charging himself with that acceptance, putting in at that time upon that information obtained from that letter and from no other source, the due date of that draft, and subsequently carrying that over in its short account, in order to charge himself with the remission of funds on

the day stated in that letter as the date of the maturity, which ran from the date of acceptance, and in that way, we submit, we prove absolutely acceptances of all of these drafts right from the books of account and records of the bankrupt; and from their own admissions as to which this Receiver is bound— 679

The Special Commissioner: Whose admissions?

Mr. McLaughlin: The admissions of the bankrupt and its book entries.

The Special Commissioner: That is an entirely different question, how far the Receiver is bound by the books of the bankrupt—that is a question that has not been yet brought before me, because 680 you have not proved the books.

Mr. McLaughlin: Well, from that point of view this may be a little out of the course, but I am now attempting to prove a letter by a member of the firm which received it.

The Special Commissioner: I suggested to you here that you had one of the managers of the corporation of Kessler & Company, Ltd., here who transacted presumably, and as I understand him to state himself, all the business in connection with these drafts. You have him here as a witness.

Mr. McLaughlin: He has no knowledge except as to two of these drafts, and they were accepted when he was on this side of the water, after he left England. 681

The Special Commissioner: He did not arrive here until the 4th of October.

Mr. McLaughlin: One was accepted on the 25th of October. One was accepted on the very day that we took possession of our escrow. Only two of these drafts that he had personal knowledge of.

The Special Commissioner: I don't think the letter is competent under their objection.

Mr. McLaughlin: Does your Honor appreciate the fact that until this particular letter, which we

682 now offer in evidence, is received by Kessler & Company, of New York, the due date of this draft is absolutely unknown to Kessler of New York?

The Special Commissioner: The due date?

Mr. McLaughlin: Yes, the due date.

Mr. Larkin: Why?

Mr. McLaughlin: Because it is a ninety-day sight draft. This letter is what fixes the due date of this draft, which is then entered in their books.

The Special Commissioner: It does not make any difference what the letter contains if it is not competent; it cannot be admitted.

683 Mr. McLaughlin: Is it possible that the books and letters and records of the bankrupt cannot be admitted in evidence in a claim between a third party and the Receiver of the bankrupt as binding on the bankrupt?

The Special Commissioner: So far as that question is concerned, that letter is not the letter of the bankrupt.

Mr. McLaughlin: It is a letter received by the bankrupt, which Kessler & Company, Ltd., debits his account with this amount.

The Special Commissioner: The letter received by the bankrupt does not bind the bankrupt, necessarily.

684 Mr. McLaughlin: Not necessarily, but this, being an account stated, it certainly does, if it is only by an entry on his books.

The Special Commissioner: Now, can you contend, as a matter of fact, that this is an account stated?

Mr. McLaughlin: Taken in connection with an entry made on the books, charging him with it—

The Special Commissioner: There is no feature of an account stated in that letter. It is merely a letter received in the course of business. That is all that is.

Mr. McLaughlin: I understand an account

stated could arise from a single item. The rule has been superseded that it must be a balance. A party can be bound by an account stated as to a single item. 685

The Special Commissioner: I have sustained the objection.

Mr. McLaughlin: I take an exception.

The Special Commissioner: I am not holding that the books of the bankrupt, properly proved, are not binding on the receiver. That is a question I will hear you about.

Mr. McLaughlin: But your Honor excludes this letter at this time on the ground that it is not competent.

The Special Commissioner: It seems to me if you bring in the bookkeeper here showing that your books have been properly kept, then you have a right to offer them in evidence, subject to their objection. They may say that the receiver is not bound by them. I have not held at all that he is not. That is another question. You have got to prove them in the proper way. 686

Mr. McLaughlin: I do not want to waste time. I have letters in regard to each one of these other drafts and similar entries. I take it——

The Special Commissioner: Isn't there an account with Kessler & Company, Limited, in your ledger? 687

Mr. McLaughlin: Right here.

The Special Commissioner: And haven't you got the original entries from which that ledger is posted?

Mr. McLaughlin: The entries are made from these letters. The entry that I want is made from——

The Special Commissioner: That is not the way bookkeepers transact business.

Mr. McLaughlin: That is the way this bookkeeper did.

688 The Special Commissioner: You will find it was a journal entry first—journal, day book—from which the entries were posted into the ledger. You should prove the day book—the entries in the day book—and so forth, and then you have made a *prima facie* case, and then the question arises whether the receiver is bound by it.

Mr. McLaughlin: Do you mean to say——

689 The Special Commissioner: You can withdraw this witness if you choose to, or you can cross-examine him as to other questions not involved in the books, and when your bookkeeper is called you can prove the books. Then, if you have got an account with them which is *prima facie* correct, I am inclined to think that the receiver is bound by them. Still, I will hear the counsel if they object; I shall hear them.

Mr. McLaughlin: Well, if it is proper, I will state that I have similar letters in regard to five other drafts and similar entries, and that I will not repeat what I have said but will take an exception to the ruling generally, and will abandon this present line of examination.

By Mr. McLaughlin:

690 Q. When was the banking firm of Kessler & Co. first established in New York? A. In 1882.

Q. Has it ever failed before? A. No.

Q. Has it ever suspended payment? A. No.

Q. Never failed to meet its payments before this assignment? A. No.

Q. What was its rating with Bradstreet at the time of this assignment?

Mr. Larkin: I object to it.

The Special Commissioner: It is not relevant.

Q. Your attention has been called to certain drafts drawn by your firm on Kessler & Company, Limited——

The Special Commissioner: You mean in the direct-examination? 691

Mr. McLaughlin: No, sir, on my examination.

Q. —on or subsequent to July 31st, 1907. I ask you if your firm had been in the habit of drawing similar drafts on Kessler & Company, Limited, since June, 1903? A. Yes.

Q. Was there any agreement or understanding between your firm and Kessler & Company, Limited, that you were to put Kessler, Limited, in funds to meet these drafts at or before maturity?

Mr. Larkin: I object to that, if your Honor pleases.

692

The Special Commissioner: In the first place, that involves a conclusion. What an agreement is is always a conclusion of law. You have already put in evidence what the correspondence that passed between them, under which you contend, undoubtedly, that there was such an agreement. In addition to that there was something said yesterday or some questions were asked the witness whether that original letter of June 30th, 1903, had ever been modified by oral communications between the parties. My recollection is that the testimony was that it had not. At least, this witness could not testify to any such agreement.

693

Mr. McLaughlin: That letter is silent on that subject.

The Special Commissioner: What subject?

Mr. McLaughlin: On this matter as to whether Kessler & Company of New York should put Kessler, Limited, in funds to meet any drafts.

The Special Commissioner: You want to prove another agreement?

Mr. McLaughlin: No, sir, not at all. We simply want to prove an understanding or course of dealing between the parties pursuant to the agreement contained in that letter—how they carried out—

694 the letter itself is silent on the question whether Kessler of New York put Kessler, Limited, in funds at or before the maturities of these drafts. It simply says that the security is deposited as a protection against long drawings—that is all the letter says. Now, I ask him if it was understood between them that——

The Special Commissioner: In so far as your letter involves a conclusion, it is objectionable. You can ask him for any oral or other agreement in writing or otherwise made between the parties on that subject.

695 Mr. McLaughlin: Well, I will withdraw that question.

By Mr. McLaughlin:

Q. I call your attention to letter of June 30, 1903, and to the sentence contained in said letter, as follows: "This escrow is intended as a protection against our long drawings against your good selves." I ask you to state in what manner Kessler & Company, Limited, were protected against your long drawings?

696 Mr. Larkin: I object to that, if the Court please. Why can't he ask him what he—this correspondence states what they did, what the course of business was. Now, how can this witness state how he protected Kessler & Company?

The Referee: I think you would be entitled to prove what the course of dealing was between Kessler of New York and Kessler of Manchester, subsequent to that letter. You have a right to prove the course of dealing, but I think the present form of the question is objectionable. I think you would be entitled to ask what was the course of dealing after the 30th of June, 1903, between the two houses.

Mr. McLaughlin: I will withdraw my question and accept the Referee's suggestion.

Q. What was the course of dealing between your house and Kessler & Company, Limited, of Manchester, subsequent to this letter of June, 1903, with reference to your long drawings on the Manchester house? A. Well, after these securities had been deposited we drew long bills on Manchester, and, as he sold some of the securities, we replaced them by putting in others, and all the securities were now in a separate— 697

Mr. Larkin: I object to that.

The Special Commissioner: Yes, you have already testified to that; that is to say, you testified to what you knew about it, that you had been there twice in the safe deposit vault and examined and checked off those securities and that that was all you knew about it. That last part there is objectionable. 698

Mr. McLaughlin: I except to your ruling, if your Honor pleases, on the ground that the witness is entitled to state the course of dealing and that he was doing so.

Mr. Larkin: In the first place, he has testified before he did not know anything about it, either.

The Special Commissioner: That he went to the safe deposit once in about two or three years.

The Witness: I always used to go there years ago.

Mr. Larkin: I move to strike out the words "All these securities were now." 699

The Referee: I think he has testified fully in regard to all he knows now. He testified yesterday that he had been there on several occasions, if I recollect right, and gone over these securities and checked them off. That they were put in a separate envelope. When it came to proving what was on the envelope, it was objected to on the ground that they should be produced, and it was shown that they could not be. I think I will sustain the objection as to that.

Mr. McLaughlin: Exception.

700 By Mr. McLaughlin:

Q. Now, will you continue, subject to his Honor's ruling, Mr. Kessler, to state the course of dealings in reference to these long drawings by your house?

A. Ten days about before these long drawings fell due on Manchester, it was our habit to send a remittance to cover them, or ask them to draw on Glynn for the amounts.

Q. To whom were these remittances forwarded by you to meet these drafts? A. They were forwarded either to Kessler & Company of Manchester—yes, as a rule to Kessler & Company of Manchester.

701 Q. These drafts were usually sight drafts—drafts sixty or ninety days' sight? A. No.

By the Special Commissioner:

Q. Long drawings? What do you mean by long drawings? A. Long drawings are drawings at sixty or ninety days, as a rule; not less than sixty days—very seldom. Now and then thirty days, but that is only at a special request.

By Mr. McLaughlin:

702 Q. Do you mean sixty-days' sight—ninety days' sight? A. Yes, or it might be seventy-two days' date.

By the Special Commissioner:

Q. Seventy-two days from date? A. Yes, that is very often used when they send the remittances to South America and they don't know when they will turn up in Europe.

By Mr. McLaughlin:

Q. Now, you have stated that about ten days before maturity of this draft, you remitted to cover the draft. In the case of a sixty days or ninety

days' sight draft, how did you know the date of maturity? A. Because the dates were given in those letters which were copied then into these books. 703

Q. That is, you were advised by letter from Kessler & Company, Limited, of Manchester, that the draft had been accepted and as to its due date—is that right?

Mr. Larkin: I object to what has been accepted.

The Special Commissioner: I will entertain the motion and grant that——

Mr. Larkin: I object to the whole question. I object to it on the ground that it is incompetent.

Mr. McLaughlin: I think he can testify that when he did receive those letters, they, at that due date, some ten days before it became due—they remitted. 704

Mr. Larkin: Yes, that is so, your Honor. There is no objection to that. They dealt with a notice, as a fact. I object to the acceptance part of that letter.

The Special Commissioner: Yes, it does not prove that they were accepted. He may show that they got a notice from them, that they received a notice from them that they acted upon.

Mr. McLaughlin: That is right.

The Special Commissioner: That is all you propose to claim or prove? 705

Mr. McLaughlin: Then——

The Witness: That is right.

By the Special Commissioner:

Q. Well, you received a notice to that effect?
A. Yes.

Q. And you then calculated from that time the due date of the draft? A. Yes.

Q. And ten days before the due date you were accustomed to remit? A. Yes.

Q. That was your usual course of business? A. Yes.

706 By Mr. McLaughlin:

Q. Now, in what form was that notice received?

A. Manchester?

Q. Yes. A. It was received by a letter.

Q. Had you at any time, from the beginning of your drawings on Kessler & Company, Limited, down to the 25th day of October, 1907, ever failed to put Kessler & Company, Limited, of Manchester, in funds to meet any of the drafts which you had drawn on them? A. No, never.

The Special Commissioner: Does that go so far as to say that they do not put Kessler & Company, Limited—

707 Mr. McLaughlin: No, sir; I stopped at the 25th of October.

The Special Commissioner: Then you mean to say that Kessler & Company of New York only owe Kessler & Company of England, Limited, the drafts drawn after the 25th of October?

Mr. McLaughlin: No, sir; they were drawn long before, but they were not coming due until November 6, and a remittance would not be made until after October 26th.

By Mr. McLaughlin:

708 Q. Can you state whether Kessler & Company of New York put Kessler & Company, Limited, in funds to meet drafts which were drawn on them on August 27th, 1907, and July 31st, 1907, and which fell due on November 6th and November 11th, 1907? A. That is all too much for me.

The Special Commissioner: He wants to know what the first draft was.

Mr. McLaughlin: It was dated August 27th and fell due on November 6th.

The Witness: No, we did not remit that.

By Mr. Larkin:

709

Q. Well, now, when you state that, Mr. Kessler, you are stating something that appears from those books, aren't you? You haven't any present recollection about it, except as you see certain entries in that book? A. But I must go to the books.

Q. Now, you would have to go to the books? A. Yes.

Mr. Larkin: Now, here again we have this objection. Can't this be done in an orderly way by the man who is in charge of these books? I do not want to be making objections all the time. I ask the Referee to warn the witness that the question calls for his personal knowledge of the transaction. 710

Mr. McLaughlin: That is proper.

Mr. Larkin: I ask the Referee to warn the witness of that.

By the Special Commissioner:

Q. That is to say, Mr. Kessler, you have no positive recollection of that draft? A. No.

Q. Your answer would be that you don't know; you couldn't tell of your own knowledge? A. Yes.

By Mr. McLaughlin:

Q. Do you know of your own knowledge, and you are not testifying from your books, but from your own knowledge that there was a draft in the amount of 20,000 Pounds drawn on Kessler & Company, Ltd., falling due about November 6th, 1907? A. Yes, I know that. 711

Q. Now, do you know of your own knowledge whether your firm put Kessler, Limited, of Manchester, in funds to meet that draft? A. Of my own knowledge I do not know.

Q. I show you a letter dated October 28th from your firm to Kessler & Company, Limited, of Man-

712 chester, and ask you if that letter was sent in the regular course of mails?

Mr. Larkin: Just a minute, now. May I see that letter?

The Special Commissioner: He has not offered it in evidence. You can see it if he offers it in evidence and I do not doubt he will let you see it now, if you wish.

Mr. Larkin: I do not wish to interrupt him. It is apparently a typewritten letter.

Mr. McLaughlin: No, it is a longhand letter.

The Witness: This is not my writing (indicating letter).

713 Mr. Larkin: How does he know? He did not sign it. How can he know that it was sent?

Q. The body of the letter is not. Is it signed by you? A. No, by Bertie Kessler.

(Question repeated as follows: "I show you a letter dated October 28th from your firm to Kessler & Company, Limited, of Manchester, and ask you if that letter was sent in the regular course of mails?")

The Special Commissioner: Do you know?

The Witness: No, I do not know. Albert Kessler signed it. He is the one.

714 By Mr. McLaughlin:

Q. Do you know whether your firm drew a draft on Kessler & Company, Limited, on October 25th or 24th?

Mr. Semple: What year?

Mr. McLaughlin: This year, 1907.

The Witness: No, I do not.

Q. You don't know anything about that draft, if there was such a draft? A. No, not unless you could mention the name and to whose order it was drawn, and then I might recollect.

Q. Do you recall a draft on or about that date for 136 Pounds, 90 days' sight, to the order of the Anglo-Foreign Bank, drawn on Kessler & Company, Limited? A. No, I do not recollect any. 715

Q. If there was such a draft, Mr. McLean would probably know about it? A. You will have to get the exchange man for all these things.

Q. I show you the original letter of your firm, Kessler & Company, Limited, dated October 25th, 1907, copy of which is contained in Exhibit A, and ask you if that letter is in your handwriting? A. Yes.

Q. Were these the enclosures which I show you referred to in that letter? (Showing papers to witness.) A. Yes. 716

By Mr. Larkin:

Q. Are these enclosures in your handwriting?

A. No. This (indicating) is in my handwriting.

Q. How do you know that, then? A. I saw them when I wrote the letter.

Q. You remember those papers distinctly? A. Those papers.

Q. Although you did not write them yourself?

A. I did not write them myself.

By Mr. McLaughlin:

717

Q. Now, one of these enclosures purports to be a list of securities and opposite them are entered "values," and the total amount is carried out in the last column. I ask you if those values, which are stated in this list which was enclosed, were the fair market value of those securities, according to your best judgment on that day?

Mr. Larkin: I object to that, if the Court please, what the statements made by the bankrupt, to Kessler & Company, of Manchester, were. They have nothing to do with the Receiver—what his

718 statements were. His testimony was that on a certain day they wrote a letter and in that letter there were certain papers. Now, those papers, if they are competent in evidence, they can speak for themselves—what the statements are. Now, he is asked, in addition to that, to state what the market value of those securities were at that time. I object to it.

Mr. McLaughlin: He is asked what his statement of the market value of securities which was rendered to our client was; a statement of the fair market value, according to his best judgment at the time.

Mr. Larkin: He did not make it up. That was
719 made up by Bertie Kessler.

The Witness: Excuse me, I put down the prices.

By Mr. McLaughlin:

Q. That paper is not in your handwriting? A. That does not matter; I put down the prices.

Q. You did not put the prices on those papers?
A. No, but I put them down for them to copy out.

Q. For who to copy out? A. Either Bertie or McGee.

Q. You don't know to whom you gave them? A. To both of them, I dare say.

Q. Do you remember the prices now? A. Yes,
720 because I put them on myself.

The Special Commissioner: How is it relevant?

Mr. McLaughlin: I think it is relevant at least upon the question of this witness' knowledge of the value of the securities on the very day when this transfer was made.

The Special Commissioner: How does the value come into the question?

Mr. McLaughlin: I think that the knowledge of his financial condition has been insisted upon as of considerable importance.

The Special Commissioner: Have these securities been transferred to—

Mr. McLaughlin: These were the securities 721
which we took possession of under our escrow on
that day.

The Special Commissioner: Well, I think they
may have some relevancy, then, to the question of
whether he saw them at the time. I suppose he
had sufficient knowledge of the securities to value
them, estimate them. In any event, the fact that
he did estimate them at a certain amount might
have some bearing on the question whether they
were solvent or insolvent. The technical objection
in regard to whether these were the prices or not,—
I suppose that he says he knows those are the fig- 722
ures that he gave. I suppose that is sufficient.

Mr. Larkin: Well, if he says that—I understood
him to so say.

The Witness: I put on the prices.

By Mr. Larkin:

Q. You are sure those are the prices you made?

A. Yes.

The Special Commissioner: Well, I will allow
him to testify as to the value of those securities,
as bearing upon the question whether he had reason
to believe or supposed himself to be insolvent at
that time.

Mr. Larkin: I take an exception. 723

By the Special Commissioner:

Q. When do you say that you gave those prices
which are put in that list—what day? A. I don't
know the day. It must have been probably the day
the list was made out.

Q. When was that list made out? A. Well, that
I could not tell.

724 By Mr. McLaughlin:

Q. Can't you tell by reference to your letter? A. It might be on the same day as this, probably, made out on the 25th of October.

By Mr. Larkin:

Q. How do you know that? A. Because it must have been made out——

Q. Simply by inference, by argument? A. No, by knowledge that I had the list made out.

By the Special Commissioner:

725 Q. But you know you made the list out? What the counsel asked you is, how do you know?

Q. You made those prices on—— A. On October 25th.

By Mr. Larkin:

Q. You have been making prices on these securities to these people for three years or more on the question of this escrow? A. Yes.

726 Q. How do you know that you made those prices on the 25th of October? A. Well, because I know that I made them when I sent out that letter. I don't go and make prices one day and then send out a letter ten days later.

Q. As a matter of fact, weren't those things placed in the envelope when the letter was handed to you to sign—those papers were in the letter? A. I wrote that letter. I did not only sign it.

Q. You did not write out the list? A. No.

Q. And the list contains the prices and is in the handwriting of Bertie Kessler, isn't it? A. Yes.

Q. What is there on that paper that makes you say you gave those prices to Bertie Kessler? A. There is nothing on the paper, but I know I gave them.

By the Special Commissioner :

727

Q. I understand you to testify you recollect now, as a matter of fact, that at or about the time you signed that letter you had that list of prices prepared? A. Yes.

Q. Gave the prices to Bertie or somebody else? A. Yes; had them made up.

By Mr. Larkin :

Q. Now, Mr. Kessler, before you commit yourself to the statement that that was made up on the 25th, suppose you look at that book?

The Special Commissioner: What is the book shown him? 728

Mr. Larkin: It is called the loan book.

Mr. Larkin: Objected to as incompetent, immaterial and irrelevant.

By the Special Commissioner :

Q. This loan book being shown you, are you able to state now when you made those prices? A. If I remember right, this was written in the book a day or two, probably, before I put those prices on, because I remember very well it was all written out here, and the book was left there. I don't think I put on the prices until probably a day or two afterwards. 729

By Mr. Larkin :

Q. There is a difference in the handwriting on that loan book, isn't there? A. Of the loan book?

By the Special Commissioner :

Q. You may mean a difference in figures? Are the securities entered in your handwriting? A. No.

730 By Mr. Larkin:

Q. What is in your handwriting? A. The figures.

Q. Well, now, your recollection having been refreshed, can you state when you made those prices? You understand that the values opposite the names of the various securities are in your handwriting? A. They are.

Q. Now, how can you say that you made those entries on the 22nd of October? A. Well, I don't say that I did.

731 Mr. McLaughlin: He does not; the date here in the book.

The Witness: I do not think that I put in those prices until two or three days after.

By Mr. McLaughlin:

Q. And the date here is October 22nd, 1907? A. Yes.

Q. And your recollection is that you put those prices in several days after? A. Not several days, but a day or two after. I asked Mr. McGee to bring those forward from the old one, from page 129.

732 Q. Now, will you refer to this letter of October 25th, 1907, and state when, according to the best of your recollection, you made up the lists which are enclosed in that letter? A. Well, I think I made them on the 25th of October.

By the Special Commissioner:

Q. That is, the prices? A. Yes.

Q. And you still think so? A. Yes.

By Mr. McLaughlin:

Q. Now, will you state whether the prices contained in that list enclosed in this letter of October 25th, 1907, were the fair market prices or values

of those securities on that day, according to your best judgment? 733

Mr. Larkin: I object to that question on the ground it is incompetent, immaterial and irrelevant, and on the ground that the witness, naturally, was not acting judicially in fixing those prices, but evidently his interest was to show the prices as large as he could, under the circumstances.

The Special Commissioner: That would go to the weight of his testimony. It would not make him incompetent. It is relevant on the question whether he was insolvent or believed himself to be insolvent—whether he had reason to believe himself insolvent at the time; so I will overrule the objection. 734

Mr. Larkin: I will take an exception.

The Witness: Some of these outside securities, of course, there is no market for at the present moment, but then that does not—

The Special Commissioner: Well, never mind. You had better state what the securities are.

The Witness: United Lighting & Heating Company there is no market for at present.

Q. Well, you speak of the market at that time?

A. There was no market then.

By Mr. McLaughlin:

Q. Did you consider it had a value? A. Yes, 735
once, they paid the dividends on the preferred stock.

By Mr. Larkin:

Q. Was this preferred stock that you had? A.
No, common.

By Mr. McLaughlin:

Q. How much dividend did they pay on the preferred stock? A. I don't know, this last time; I think it is five per cent. The Daimler Manufacturing Company earned last year a good deal more than this dividend on that preferred.

736 By Mr. Larkin:

Q. Won't you state whether there is a market for it? A. There is no market for the Daimler, although I don't know—there may be any day.

By Mr. McLaughlin:

Q. Did you consider that a fair value on that day for that stock? A. Well, I think the preferred stock is worth it, because they have cotton and all sorts of things of that kind. United Breweries, 6's—they pay six per cent. all the time.

737 By Mr. Larkin:

Q. Any market for them? A. No, there is not much market. The notes of course are not due. The notes—the long notes.

Q. It might save a lot of time to state when they are due and whether there is a market for them? A. No, there no market for them. It is not down here.

Q. Will you answer that? A. There is a market. I have been offered 65 for those.

738 Q. You stated a moment ago there was no market and now you say there is a market? A. It means there is no market so as to sell that at any decent price. 65 is the best bid I got for United Breweries.

Q. For the bonds? A. For the bonds.

Q. When did you get it? A. That was—it was a month ago, a little over a month ago. We sold some bonds at 68, and then I had afterwards some sold at 60 and then 65. I did not sell at 65—65 I never sold it for.

By Mr. McLaughlin:

Q. Mr. Kessler, just state, after looking at that list, whether those prices at which those securities were listed by you were fair market prices for

those securities on the days—on October 25th, 1907 739
—according to your best judgment on that date?

A. Well, the Underground, of course, that is another thing. That is going to last a year or two before that gives out, from what I can tell.

Q. When you sent that list with those prices, you intended it as a statement of your best judgment as to the value of the securities, didn't you?

Mr. Larkin: I object to the form of the question—what his intention was.

The Special Commissioner: You may as well strike it out. You can show that that was his honest estimate, best judgment, as to the value of those securities.

740

The Witness: It is an honest estimate. Of course, the Underground are taken a lot too high, because—of course, I don't know what they will be worth and Speyers don't know, either, and they are the people I have gone to for information. They say you have only got to hold on and it may turn out all right, but it may take a long time. The rest of the things are all right. The Standard Rolling Bearings, United States Reduction, pay six.

By Mr. Larkin:

Q. What—on the common? A. No, on the preferred. 741

Q. Why don't you separate preferred from the common when you make these statements? A. Well, United States Reduction Preferred pays six. The common does not pay anything. Pittsburg—Westmoreland pays five per cent.

By Mr. McLaughlin:

Q. You need not go through at this time. If you are going to cross-examine, Mr. Larkin, I think it is a waste of time.

742 Mr. McLaughlin: I will offer that letter of October 25, 1907, in evidence.

Said letter and the two enclosures contained therein—list of estimated value—admitted in evidence and marked “Kessler & Company, Limited, Exhibit C.”

Q. Mr. Kessler, on the 25th day of October, 1907, at the time Mr. Henry Kessler took possession of the securities, had you any intention to prefer Kessler & Company, Limited? A. None whatever.

Q. Did you know that you were insolvent on that day, if such were the fact? A. No, I did not.

743 Q. You have stated in your direct-examination that on October 29th, 1907, you went to see Mr. Kissel. Do you recall that? A. Yes, or Mr. Kissel came to see me.

Q. He came to see you? A. Yes.

Q. Now, will you state whether you told Mr. Kissel that you were going to make an assignment or whether Mr. Kissel suggested to you that you should make an assignment at that time? A. Mr. Kissel suggested to me that I should make an assignment.

The Special Commissioner: I understood he said he went to see Kissel and Kissel was out and then Kissel came to see him.

744 Q. Has the business of your firm been profitable during the last six years? A. Pretty well.

Q. Has it shown a profit in certain years of those six years? A. Oh, yes—three or four years we made very good profits.

Q. Were there bad years during that time? A. One or two. We came out bad often.

Q. Well, what were those years? A. Oh, I don't know.

Q. There were no years, as I understand it, that you now recall, of heavy losses? A. No, none of heavy losses.

Q. Now, you have testified on your direct-examination to certain lunches with Henry Kessler. Were others present at those lunches—during the week of October 21st? A. I don't know. He was there, though. 745

Q. Do you remember where you took lunch? A. Yes, at the Downtown Club.

Q. How many such occasions were there during that week? A. I think two.

Q. Do you remember whether there were others present at the table? A. I don't know. I would not swear, because I am not sure. I go there every day, and now and then there are some there, and now and then there are not. Mr. Henry Kessler would remember better than I could. 746

Q. Did you have a regular table at which you always sat? A. Yes. We went to the regular table. Mr. Iselin and Mr. McDonald and I always sat—now and then some other friend—Mr. Dickerman or Mr. Cleveland H. Dodge.

Q. And you sat at that table on these two occasions? A. Yes.

Q. Now, as to this dinner at the Hotel Gotham on October 21st, you and your wife were the guests of Mr. and Mrs. Henry Kessler? A. Yes, but Mrs. Henry Kessler did not come down to dinner.

Q. How did you happen to go there to dinner on that night. Do you recall the circumstances? A. No. I think Mr. Henry Kessler asked us to go. 747

Q. Do you recall that you had just arrived from Tuxedo? A. Tuxedo?

Q. Rather late for dinner? A. No, I don't remember.

Q. Do you remember that you called Mr. Henry Kessler up and told him that you were coming? A. Yes.

Q. In the afternoon of the 21st? A. Yes.

Q. That you had just gotten in from Tuxedo? A. Yes. What date was that, now?

748 Q. October 21st, 1907. When you went upstairs after that dinner on October 21st, whom did you meet at the Hotel Gotham? A. I met Mrs. Henry Kessler.

Q. And you and your wife and Mr. and Mrs. Henry Kessler were together until you left? A. Yes.

Q. On your direct-examination, you referred to folio 161 of the loan book, to an entry showing a loan of \$190,000 from J. P. Morgan & Co. on October 30th. Now, is it not a fact that that was the same loan which you negotiated on October 29th, and which you testified was taken over by Morgan & Co. from certain banks? A. No, that was to take up the loan in the Mechanics' Bank and in the City Bank.

Q. When you say "that," which do you mean? A. The Central Trust—you mean the loan that was called, didn't you?

Q. I am asking you now about his loan, the entry of which appears at folio 161 of your loan book under date of October 30th? A. Can I look at the book or not?

Q. Yes. Have you got that book here? A. I have it here, the one I want.

(After looking at book.)

750

This is the Morgan loan that is here.

Q. Yes. Do you find a loan of \$190,000 under October 30th? A. Yes.

Q. On folios 161 and 162, do you find two loans, one of \$90,000 and one of \$100,000? A. (No answer.)

Q. Now, was that the only loan—were those two the only loans you procured from J. P. Morgan & Company during that week? A. Yes.

Q. Were those loans which were taken over by J. P. Morgan & Company from certain banks? A. The City and the Mechanics'.

Q. And were those loans secured? A. Yes; by a good margin, I think. 751

Q. You paid off the Central Trust Company \$100,000 on October 28th, 1907, did you not? A. Yes.

Q. At the time you made your payment to the Central Trust Company, did you intend to make a preference to them?

Mr. Larkin: I object to that.

The Special Commissioner: Objection overruled.

The Witness: No, no intention of making a preference to anyone.

Mr. Larkin: I move to strike the answer out.

The Special Commissioner: Yes, answer the question. A. No. 752

Q. Did you personally know the amount of your liabilities on the 25th of October, 1907?

The Special Commissioner: Objection overruled.

The Witness: No, no intention of making a preference to anyone.

Mr. Larkin: I move to strike the answer out.

The Special Commissioner: Yes, answer the question. A. No.

Q. Did you personally know the amount of your liabilities on the 25th of October, 1907?

Mr. Larkin: I object to that, if the Court pleases—the same objection I made before. He is bound to know what the liabilities are, as far as his credit was concerned. He cannot avoid the legal responsibility by saying he did not know. 753

Mr. McLaughlin: That is a legal question, if your Honor pleases.

The Special Commissioner: What is the answer?

The Witness: I do not know at all.

The Special Commissioner: I think I will allow him to answer that question.

Q. Now, do you understand the question, Mr. Kessler?

754 Mr. Larkin: He has already answered it. He says he did not know his liabilities.

The Witness: I did not know.

Q. Now, you have stated, Mr. Kessler, that your firm was engaged in a banking business, and you have referred to the fact that a part of your business was dealing in foreign exchange. Did you have other business besides dealing in foreign exchange? A. More or less, yes.

Q. Were you members of the Stock Exchange here in New York? A. Yes.

Q. Had a seat there? A. Had a seat there.

755 Q. Did you carry accounts for customers in stocks and bonds? A. Yes, but not very many.

Q. Did you do an investment business? A. Yes.

Q. Did you accept money for deposit—on deposit? A. Small amounts. As a rule, I was always opposed to it. I did not care for any deposit business, and Mr. Flinsch always liked to have it. Why, I do not know.

Q. Did you act as bankers for mercantile houses in advancing money secured by accounts? A. Yes, for several.

756 Q. Can you now mention any other branches of your business which has not been referred to? A. Well, the syndicate business and letters of credit, especially commercial, and keeping securities for other people and cutting coupons off, and altogether looking after a great deal of other people's money.

Q. What do you mean by syndicate business? A. Joining in syndicates.

Q. Do you know what kind of business Kessler & Company, Ltd. carried on? A. They only did dry goods business.

Q. You testified, if I remember right, that at the time Henry Kessler asked for the securities of Kessler & Company, Ltd., on October 25th, 1907, you stated to him, in substance, "You can do what

you like with them; they are yours"? A. That is true. 757

Q. What did you mean by that statement?

Mr. Larkin: I object to that, what he meant by it. It is the Court's province to determine what he meant by a statement.

The Special Commissioner: I do not see—— I sustain the objection.

Mr. McLaughlin: I take an exception.

Q. Was your firm, at the time you made that statement, indebted to Kessler & Company, Ltd.?

A. Yes.

Q. In what way? A. On the long drafts.

Q. Do you know that? A. Oh, yes. 758

By Mr. Larkin:

Q. On October 25th, 1907, you say that your firm was——

Mr. McLaughlin: Now he says he knows.

By Mr. McLaughlin:

Q. In what way? A. On the long drafts.

Q. To what amount, if you know? A. Well, I knew it was somewhere about \$400,000, somewhere around there.

Q. And when you made that statement to which I have just referred to Henry Kessler, it was your understanding that those securities were theirs as a protection against this indebtedness of about \$400,000? 759

Mr. Larkin: I object to that.

The Special Commissioner: That is excluded.

Q. When you made that statement, was this indebtedness of \$400,000 one of the things you had in your mind?

Mr. Larkin: Well, I object to what he had in his mind, if the Court pleases. He might have

760 had a great many things in his mind, probably did. He didn't say anything to Henry Kessler about it.

Mr. McLaughlin: I only asked him one thing.

The Special Commissioner: I don't think we can go investigating the witness' mind, what he has in his mind. There would be no end to the examination. I will sustain the objection.

Mr. McLaughlin: Exception.

NEW YORK, December 4, 1907, 10.30 A. M.

761 Met pursuant to adjournment.

Same appearances, and

ABRAM I. ELKUS, Esq., of counsel for Kessler & Company, Limited, and the Liquidators.

CRAVATH, HENDERSON & DEGERSDORFF, Esqs.,
For Kleinworth, Sons & Company, general creditors.

Mr. McLaughlin: We have concluded our cross-examination of this witness. We may want to recall him later.

ALFRED KESSLER (examination continued).

762 REDIRECT-EXAMINATION BY MR. LARKIN.

Q. Mr. Kessler, the cables that passed between you and Flinsch you have not been able to find as yet? A. No; I have not found them. I told you about that. The cable from Tuxedo I couldn't possibly get unless I got it from the club or somewhere. I don't know, but you see they only cable from the club to the house.

Q. Telephoned to you? A. Yes.

The Special Commissioner: He has already stated, and without objection, the contents of the cable he received from Flinsch—"Refrain Morgan."

The Witness: It meant "confer with."

763

The Special Commissioner: He says that is all there was.

The Witness: Yes, I did testify that.

By Mr. Larkin:

Q. What code do you use? A. The Hartfield Code.

Q. And the word "refrain" was a code word? A. Yes.

Q. You had a code at Tuxedo? A. Yes.

Q. Now, Mr. Kessler, you remember that you had a dinner with your cousin at the Gotham on the 21st? A. Yes. I don't know whether it was the 21st, but it was——

764

Q. Was it because of that interview you had this account written up?

Mr. Elkus: I object to it as calling for the witness' conclusion; it is incompetent.

The Special Commissioner: Objection overruled.

By Mr. Larkin:

Q. What was your answer? A. No.

Q. You recollect testifying, do you not, that this account you requested McGee to transfer over from the pages of your loan book to the folio 159? A. Yes; because it is so mixed up.

765

Q. You asked him to do that? A. Yes.

Q. And apparently that was done on the 22d, according to the entry that was made here?

Mr. Elkus: I object to that.

By the Special Commissioner:

Q. When was it done? A. Oh, I can't tell you.

Q. The question is when the list was made? A. That I can't tell you.

Q. When the list of securities was entered there——

766

that is the question—if you know? A. No, I couldn't tell.

Q. Whose handwriting is it? A. A man named Catt, we used to have in our office. He is not there any more.

By Mr. Larkin:

Q. Well, now, is the handwriting of Mr. Catt on the following pages: 160 and 161 and 162? Just look at it.

(The witness does so.)

A. That is Mr. McGee's.

767

Q. On 158 is Mr. McGee's? A. I don't know whose handwriting that is.

Q. Whose handwriting at page 160? A. Well, it looks like McGee's.

Q. And 161—you don't know whose handwriting that is? A. No; it must be Catt again. I suppose same handwriting. You can see just as well as I can.

Q. How about 162? A. I don't know; it looks the same handwriting.

Q. Now, these securities which were carried in this book of yours on page 159 are transferred from what page?

768

Mr. Elkus: I object to that. It assumes they were transferred. The book speaks for itself.

The Special Commissioner: He said so yesterday.

Mr. McLaughlin: We object on the further ground that it is attempted by this question to have this witness testify as to entries in books of account which he did not make.

The Special Commissioner: I don't know that he did make the entries.

Mr. Elkus: And I object as incompetent, immaterial and irrelevant, and it is getting the witness to testify to the contents of a book not in evidence.

The Special Commissioner: Perhaps they are

going to put it in evidence. You want to identify it first. 769

Mr. Elkus: Yes, identify it first. I want to make the further objection that this calls for the conclusion of the witness in the use of the word "transferred" from one page to the other. The witness has not been shown to have any knowledge of this book nor to have kept it nor to have made any entries nor to have participated in the so-called transfer.

The Special Commissioner: Objection overruled.
Mr. Elkus: Exception.

By the Special Commissioner:

770

Q. Have you examined page 129? A. What am I to examine—just to compare them or anything of that sort?

Q. Have you examined page 129? A. You want to take each thing for itself?

Q. Generally, those securities? A. There is always a change. They would not be the same securities, necessarily, because we are always changing them.

Q. They would be the securities that Kessler & Company, Limited, claim were pledged? A. Yes.

It is stipulated by counsel for Kessler & Company, Limited, of Manchester, and for Frank Youatt, the Provisional Liquidator, that their answer to the petition will be put in at once.

771

Q. I ask you whether that (indicating) is not transferred from page 129? A. Yes, I think it is.

Q. Now, turn to page 129? A. I have got page 129.

Q. Where was page 129 transferred from—what page? A. Well, it says here "Re-written on page —" Oh, well, I would have to go back.

772 Q. Where was that re-written from? A. It is re-written——

Q. Did you re-write it? A. No.

Mr. Elkus: I object to it, your Honor, as incompetent, immaterial and irrelevant.

(No ruling.)

Q. This book, Mr. Kessler, is your regular loan book that you have in your office? A. Yes.

Q. And which you have examined from time to time. It is kept under your direction, isn't it? A. No, kept under McGee's direction.

773 Q. Haven't you any control over McGee? Didn't you tell him what to do about it? A. Well, I always——

Q. Well, you run the loan book, or does McGee run it? A. Both run it. I generally run the Kessler & Company escrow.

Q. You run the Kessler & Company escrow personally, do you? A. Yes.

Q. And the entries which were made in that book from time to time—were the sales made by you or under your direction? A. Under my direction.

774 Q. So that all the work in the Kessler & Company transaction from 1903 down to the present time was really under your personal knowledge, wasn't it? A. Yes.

By Mr. Elkus:

Q. Were all these entries made under your personal knowledge? A. I don't know whether they were made from my personal knowledge, but I told them to put in such and such securities, but I couldn't tell——

By Mr. Larkin:

Q. So, of course, from time to time, as you sold, you had to look over the loan book? A. Now and then, yes.

Q. Is there any reason for you to believe that those entries that remain there are not correct? 775

A. No.

Mr. Elkus: I object to that.

Q. You believe the entries to be correct?

Mr. Elkus: I object to that.

Q. Mr. Kessler, can you turn to the first page in that book which relates to that transaction with Kessler & Company in 1903? A. In this book (indicating)?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant, and getting into evidence the contents of a book which is not proven. 776

The Special Commissioner: Objection overruled.

Mr. Elkus: Exception.

Q. I ask you to please turn to the page in that book which contains the first entry regarding these securities?

(The witness does so.)

The Special Commissioner: Mark the book for identification first.

Marked Receiver's Exhibit 4 for Identification. 777

A. Page 37 seems to be the first in this book.

Q. The date of that page is April 15, 1904?

Mr. Elkus: I object to that as giving the contents of a book not in evidence.

The Special Commissioner: Objection overruled.

Mr. Elkus: Exception.

Q. Look at the book, April 15th.

Mr. Elkus: I object to that on the same grounds—entirely incompetent.

Objection overruled. Exception.

778 Q. Now, did you have another book which had other transactions? A. Yes; I suppose there must have been fifty books ahead of that.

Q. Fifty books ahead of the loan book? A. I daresay; but that whole thing would not be necessary to have in that book, really, because now, for instance, if Mr. Bacon wrote that letter and forgot to tell Mr. McGee, and when I was in Europe how could it be in the book?

Q. Mr. Kessler, you remember the letter of June 30, 1903, which was offered in evidence by Mr. McLaughlin a day or two ago. Just read it. A. No, I don't remember it. I was in Europe when Mr. Flinsch wrote that letter.

779 Q. Did you notice that this letter says, "In accordance with instructions from Mr. Alfred Kessler"? A. That may be.

Q. Those instructions were in writing? A. Probably.

Q. Who has them? A. Mr. Bacon might have them, but I don't know.

Q. Did Mr. Bacon take those instructions with him when he left your house? A. They must have been in writing, because I was in Europe; but I don't think any one keeps those letters. That is, you keep them a short time and then throw them away. That would be a private letter from me to Bacon.

780 Q. Your recollection now is that that letter of instructions was thrown away? A. I wasn't here.

Q. Have you ever seen it since you have been here in this country—since 1903? A. No.

Q. The first securities which you wrote to Kessler about were the Oklahoma Gas & Electric, were they not? A. I don't know.

Q. Well, just look at that. A. Well, it says so here. Well, what about it?

Q. You see the list of securities there? A. I see the list.

Q. As of the 30th of June, 1903? A. Yes. 781

Q. Will you please turn to your loan book and see whether you find any page in the loan book which refers to those securities in connection with Kessler & Company, of Manchester?

The Special Commissioner: Please mark that for identification.

Marked Receiver's Exhibit 5 for Identification.

Mr. Elkus: I object to that as immaterial and irrelevant. Whether or not it is in the book, it has no binding effect on us.

Objection overruled. Exception. 782

A. I looked through the book. I did not see it there and, if it is in any book, it would be in the book previous to that, and I was in Europe at the time, and Mr. Bacon will probably have dictated that letter, though Mr. Flinsch signed it; and Mr. McGee may have been on his holiday, and that would account for that slipping up. I mean if it is not. I don't believe it is in, because I looked through this book and did not find it.

By Mr. Elkus:

Q. In this particular book? A. No, in the book before that. 783

By Mr. Larkin:

Q. You referred, Mr. Kessler, to a book before this? A. Yes.

Q. Which you examined a few days before? A. Not a few days before.

Q. Well, how long ago? A. Well, perhaps a month ago, three weeks ago.

Q. There is such a book in existence, or was at that time? A. Yes.

784 Q. And who kept that book—Mr. McGee? A. Mr. McGee kept that book.

Q. Well, now what were you examining that book for? A. I don't know.

Q. Did you find, having examined the book, any account of securities of Kessler & Company?

Mr. Elkus: I object to giving the contents of a book not produced, not here; incompetent, immaterial and irrelevant.

Objection overruled. Exception.

785 Q. Now, Mr. Kessler, is this the book which you state preceded that to which you have been testifying, which has an entry on the 12th of April, 1904, known as the loan book, and marked Exhibit 4 for identification?

Mr. Elkus: Objected to as incompetent, immaterial and irrelevant, and as characterizing the book.

Objection overruled. Exception.

A. Yes.

Q. Now, will you refer to this book and point out the pages therein which relate to Kessler & Company, of Manchester?

786 Mr. Elkus: Objected to as incompetent and giving the contents of a book which is not in evidence.

By the Special Commissioner:

Q. What do you call it? A. Call it a loan book.

Objection overruled. Exception.

By Mr. Larkin:

Q. Now, will you refer to this book and point out the pages— You have looked through the book and cannot find any entries? A. No.

By Mr. Elkus:

787

Q. Are these books regularly kept, or what kind of books are they? A. They are books that are kept in the cashier's box, and he puts down, as a rule, all these loans.

Q. Do they contain all the transactions? A. Well, I have always been under the impression they did.

Q. Or are they memorandum books? A. They are memorandum books. They are not for taking real bookings in the books.

Q. They are not regular books of account? A. No.

788

By Mr. Larkin:

Q. What books did you keep for loan accounts—in which you kept your transactions in regard to loans?

Mr. Elkus: If he knows.

Q. Yes, if you know? A. A time loan would be in the ledger; any time loans.

Q. Yes? A. And, if it was a call loan, like some of these there, it would be in the call loans.

Q. What do you call these books that you have been talking about? A. When you loaned and when you borrowed money.

789

Q. What do you call the books?

Mr. Elkus: That is objected to.

Objection overruled.

A. They call it a loan book.

Q. What do you keep in the book—what records?

Mr. Elkus: I object to that, because the book speaks for itself.

Q. What records do you keep in the loan books?

790 Mr. Elkus: That is incompetent, immaterial and irrelevant.

Objection sustained.

By Mr. Elkus:

Q. You didn't keep the books? A. No, I didn't keep the books.

By Mr. Larkin:

Q. What did you keep those books for? A. They are to show what money is loaned and what money we borrowed.

791 Q. And those are books of original entry in that regard?

Mr. Elkus: If he knows.

A. I suppose you might call it. There are no bookings made from those.

Q. Isn't that a record of your loans made and the securities which you receive for loans which you make, as well as the record of the securities which you put up for loans that you obtain for your own account?

Mr. Elkus: Same objection as before.

792 Objection overruled. Exception.

A. Yes; it is supposed to be the book.

Q. Why do you say "supposed to be"? Have you any doubt about it? A. No; not that I know of.

Q. Have you any other record in your office except these two books in which you keep a record of the loans made by you or loans obtained for you?

Mr. Elkus: I object to it unless it is shown that he knows whether or not there is such another record, and upon the same grounds as before.

Objection withdrawn.

A. Well, I don't know.

793

Q. Well, now, Mr. Kessler, I understand you to say that you don't know whether these books are the only books that keep the details of your loans?

A. I don't think there are any others, but I have always gone to these.

Q. Do you know of any others? A. No.

Q. Have you ever gone to any other books for the details of your loans than these two books to which you have been referred this morning? A. No.

By the Special Commissioner:

Q. That is, during the period covered by those entries in that book? A. I have always gone by these letters that you have taken out of my books; that is, with the Manchester things.

794

By Mr. Elkus:

Q. What do you mean by the Manchester? A. These Manchester letters he has got there—these transactions of Kessler & Company, Limited—these transactions out of my private books.

By Mr. Larkin:

Q. What private books do you say that those were copied from? A. From mine; from my own.

795

Q. Your private letter book? A. Yes.

Mr. Elkus: Has the letter book been turned over to the Receiver?

Mr. Larkin: Yes.

The Witness: I have gotten them in my desk at the present moment. Mr. Macfarlane gave me them back.

By Mr. Elkus:

Q. You gave them to the Receiver? A. Yes. They only had them three or four days. I only

796 hold them now; they are not really mine now. They are really yet in the possession of the Receiver.

By Mr. Larkin:

Q. Will you turn to the page of the loan book which you stated is the first page? A. Page 37.

Q. That contains your record of transactions with Kessler & Company? A. This is the record—this book here.

Mr. Elkus: Tell him to turn to page 37 and see whether that is it.

797 The witness does so.

Q. Now, Mr. Kessler, look on that page and state whether or not——

By the Special Commissioner:

Q. There is no earlier record of that escrow transaction in that book, is there? A. No.

Mr. Elkus: I object to the question before on the ground that whether there is or not has no binding effect, has no material effect, as far as we are concerned.

Objection overruled. Exception.

798

By Mr. Larkin:

Q. Now, Mr. Kessler, a line being drawn through "7 Denver & Southwest. First, \$78,260"——

Mr. Elkus: I object to that as giving the contents of a paper or book not in evidence; incompetent and improper, and it is in no way binding upon us.

Objection overruled. Exception.

A. You want to know what the transaction was?

By the Special Commissioner:

799

Q. Yes, if you know? A. Well; I think I know. I looked it up some time ago.

By Mr. Larkin:

Q. I call your attention to some lead pencil figures opposite the same entry and ask you in whose handwriting those are? A. In my handwriting.

Q. Does that entry and that lead pencil memorandum of yours refresh your recollection in regard to that transaction? A. Well, I haven't put down what it is, but it is either Denver & Southwestern—

800

Mr. Larkin: Don't say what it is.

Mr. Elkus: But he wants to know whether you have a recollection about it?

The Special Commissioner: Whether those memoranda there refresh your memory as to some transaction or other—that is the question.

Mr. Elkus: It calls for yes or no.

The Witness: Well, yes.

Q. Now, what is your recollection of the transaction?

Mr. Elkus: That is objected to as incompetent, immaterial and irrelevant.

801

Objection overruled. Exception.

A. It is one of two things; that is all I can say.

By the Special Commissioner:

Q. That does not give any light. What two things? A. It is either Denver & Southwestern stock— You see, I have not put down the name of the stock in full or Cripple Creek stock; and probably it is the Cripple Creek, because that would be about what we got for \$78,280 Denver & Southwestern 1st Mortgage bonds.

802 By Mr. Larkin:

Q. The Denver & Southwestern were converted into Cripple Creek stock? What else could it be?

A. It could have been Denver & Southwestern stock.

By the Special Commissioner:

Q. Instead of the bonds? Have you any definite recollection? A. No.

Q. But your recollection is that it is either one or the other, but you don't know which? A. Yes.

803 By Mr. Larkin:

Q. Now, in ordinary course, Mr. Kessler, you would have written a letter regarding this transaction which you have now spoken of, wouldn't you, advising the Manchester house of what you had done? A. Well, not necessarily the very same day, but I would have written shortly afterwards; perhaps, if I had been making another change, a week later. I would wait until I got them all together.

Q. Well, did you make another change at about that time? A. That I don't know.

804 Q. Well, I call your attention to an entry where a line is drawn, you see, with the figures of \$20,000 opposite the entry of the note of Charles J. Devlin. Having called your attention, I ask you whether you remember about that transaction? A. Well, I remember the Devlin note is \$50,000, and have not actually paid it off. He seems to have paid off the difference between eight and twenty—twelve, probably.

Q. That is your recollection of it now? A. Yes.

Q. I call your attention to an entry regarding twenty-three thousand, where the pen is drawn through it, relating to Underground notes of London, and, calling your attention to it, ask you

what that transaction is—whether it refreshes your recollection in regard to that transaction? A. I suppose we sold the notes and left twenty thousand instead of twenty-three. 805

Q. Now, I call your attention to entries and lines drawn through entries regarding the certificates of Chicago and Great Western bonds, and ask you to look at that and state whether or not it refreshes your recollection? A. No; we simply put in more bonds than we had there.

Q. What do you mean by saying "No"? A. Well, I mean that I don't recall anything, but I see there is a change. We had 168 bonds and then we had 222. 806

Q. You had 168,500 worth of bonds at par, did you? A. I don't know. It couldn't have been the par.

Q. What is your figure? A. Certificate, syndicate certificate of the Chicago & Great Western? It was when the Oldwein Extension—

Q. Now, opposite that you had it originally \$149,965? A. Well, there are too many scratchings here. It is very hard to make out.

Q. Is it hard to make out?

Mr. Elkus: That is giving the contents of the books—whether he did not originally have something there. I object to that as giving the contents of the book. 807

The Special Commissioner: You can call his attention to that matter simply for refreshing his memory. It cannot be used for any other purpose that I can see.

The Witness: If there is, I cannot remember, of course.

Q. I call your attention to an entry here—"August 26—80"—on the same line in which the certificate of the Chicago & Great Western bonds are referred to, and ask you if that does not refresh

808 your recollection as to a transaction about that day, August 28th?

Mr. Elkus: Is the transaction a transaction with Kessler & Company, Limited?

Mr. Larkin: It all relates to Kessler & Company, Limited.

The Special Commissioner: Let him look at it and find out himself.

The Witness: Here there are three lines, all crossed off. Now, I don't really know whether that is the case or not, whether—there are all these lines crossed off——

809 Q. Doesn't mean that there was a change in the transaction? Isn't that your recollection of it?

Mr. Elkus: I object to it as giving the contents of the books. He is asking if a line doesn't mean a certain thing.

The Special Commissioner: Objection overruled.

Mr. Elkus: Exception.

The Witness: There must have been a change; there is no doubt about that.

Q. Can you recollect what that change was? A. No, I cannot.

810 Q. I call your attention to a lead pencil memorandum opposite the same entries. Is that lead pencil memorandum in your handwriting? A. Yes.

Q. Does that memorandum refresh your recollection? A. No.

Q. After reading it? A. No.

Q. Just read that lead pencil memorandum?

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant.

The Special Commissioner: You can only get that in evidence by showing that he made it, that he knew it was true when he made it. He says that at the present time he has no recollection of it.

Q. Now, Mr. Kessler, is that lead pencil memorandum in your handwriting? A. Yes. 811

Q. Was it correct when you made it? A. I suppose so.

Q. Was it a statement of fact? A. Yes.

Q. Well, now, I call your attention also to a lead pencil memorandum on the very foot of this page—the last entry on the page, isn't it? A. Yes.

Q. Is that in your handwriting? A. Yes.

Q. You have already testified that this Kessler escrow matter was under your personal charge, did you not? A. Yes, when I was here.

Q. And these entries were made by you from time to time on this page? A. No; this was about the only page they were made on. 812

Q. On this page? A. Yes.

Q. You know, by looking at that page, that the transactions therein set forth are correct, according to your knowledge?

Mr. Elkus: I object to it upon the ground that it is in no way binding upon Kessler & Company, Limited. It is a page in the book of Kessler & Company, of New York.

(No ruling.)

Q. Take the case of the Underground Electric of London. Do you recollect that transaction? A. Yes, I recollect the transaction. 813

Q. Well, what do you recollect about it? A. That we joined the syndicate with Speyer & Company.

Q. And you subscribed to certain rights and privileges in that syndicate? A. Yes.

Q. And what was the amount of your subscription? A. That I forget. Ten thousand pounds, I think.

Q. Well, do you recollect anything about this entry appearing in that book in regard to the Underground Company, of London? A. No, I don't.

Q. Well, do you wish the Referee to understand

814 that McGee went into the books and took out certain things to put them into Kessler of Manchester account without your knowledge or consent?

Mr. Elkus: I object to that as unfair.

Mr. Larkin: It is not unfair at all.

The Special Commissioner: Well, the point is this: In all these transactions that he has any general recollection about, he can use that book to refresh his recollection and explain in detail. If he cannot do it, why, that is all you can get out of him. You can call McGee or anybody else who made those entries and you can prove those as correct entries and as facts which were true at the
815 time and would not have been entered if they had not been true. But you cannot prove it in this way by this witness if they object to it.

Q. In whose handwriting are the entries on this page, except the handwriting which you have pointed out as being yours? A. Mr. McGee's.

Q. Please look at the entries which are in Mr. McGee's handwriting and state whether you can tell the Referee whether your recollection in regard to these transactions is refreshed at all? A. No.

Q. You cannot remember anything about any of the transactions? A. We made so many changes, I can't exactly remember what they were.

816 Q. I call your attention to the various entries on that page in McGee's handwriting and ask you whether you can remember any of the transactions which are referred to on that page? A. I have told you about the first one, haven't I?

Q. What is the first one that you have told me about? A. About the exchange—Denver & Southwestern bonds into the Cripple Creek or—but I would have to find out which it was, because it is not written down there.

Q. Not written down there? A. No.

By the Special Commissioner:

817

Q. Were there any others? A. There are so many lines here that I can't make it out, except that I see here if you added \$40,000 to 168 it would almost bring up that amount.

Q. Forty thousand what? A. Well, these are the same syndicate, don't you see. Here it says something about Oldwein and here is Hayfield; so that is probably one account—some transaction, whatever happened there; but I couldn't remember what it was. It may be changing the certificate into bonds, because the bonds—the other was probably the certificate—

Q. Won't you state just what the transaction was which required you to change the certificate into bonds or *vice versa*? A. Whenever a syndicate is made, formed, you never get the certificates at once. You only get the certificate, and that certificate is just as good, or looked upon just as well as the real stuff; and then, later on, when the engraver gets through and everything has gone through the law and everything is legal, then, all at once, about six months later, you will receive the bonds or the stock, whatever it is. 818

Q. I call your attention in regard to the Chicago & Great Western stock—do you see what it is?—and call your attention to the lines drawn through \$25,275, and ask you whether or not the entry there does not refresh your recollection of the transaction? A. No. 819

Q. It does not? A. No.

Q. You notice, do you not, the words, "Oldwein at 15, 11,250"? A. No; it could not be Oldwein at 15, because we never had Oldwein stock. We only had Chicago & Great Western stock.

Q. Whose handwriting is that? A. Mr. McGee's. He says, "*In re* Oldwein Extension," but it doesn't say "Oldwein stock."

820 Q. What is the Oldwein Extension? A. It is one of the branches that we took for the Chicago-Great Western.

Q. I call your attention to the date August 26th, and ask you whether you can state whether that is the correct date as to this transaction? A. No, I couldn't tell you.

Q. Doesn't refresh your recollection? A. No.

Q. I call your attention to the lines drawn through 70,000, opposite "participations"—that is, "Participations, Cleveland, Cincinnati, Hamilton & Dayton Syndicate, 70% debt," and ask you whether that refreshes your recollection regarding
821 that transaction? A. No.

Q. Do you notice the "55,000" over the "70,000"? A. Yes.

Q. Does that refresh your recollection about that transaction? A. No; not unless we sold some of the participations.

Q. Now, when these lines appear, it represents a change in the securities? A. Not necessarily. It means marking up or marking down of prices.

Q. Or change in the securities—either one of three things?

Mr. Elkus: I object to what it might be.

822 By the Special Commissioner:

Q. What does it mean? A. Why, I don't know.

ALFRED KESSLER resumes the stand.

REDIRECT-EXAMINATION (Continued):

EXAMINED BY MR. LARKIN:

Q. Now, Mr. Kessler, please look at page 77 of the loan book and, after looking at it, state to what page of the loan book that account was transferred?

Mr. Elkus: What do you mean by that; whether 823 that was the account that was transferred?

Mr. Larkin: I am asking him whether that account was transferred to another page of the loan book; and, if so, what page?

Mr. Elkus: I object as calling for the witness' conclusion, and proving the contents of a book not in evidence. I have no objection to the question, on which page he next finds a statement of this account.

The Special Commissioner: That will do just as well. Take that.

Mr. Larkin: That will do just the same.

The Witness: Well, the next page is 45 on here. 824

Q. Now, do you find any marks on that page in your handwriting? A. No.

Q. What? A. Except the addition.

Q. Except what? A. The addition here.

Mr. Elkus: Some figures?

The Witness: Yes, and I have written down, "Page 37."

Q. You have written down page 37? A. Yes.

Q. You have footed up certain figures, have you? A. Yes.

Q. Down to what point? A. Here (indicating).

Q. How many lines do you find on that page? A. 825 Eleven.

The Special Commissioner: Eleven pages from the bottom?

The Witness: Yes.

Q. Now, having seen your footing there representing the addition, are you able to state now whether the entries which preceded your footings were on that page when you made the footing? A. Yes, those were all there, I suppose.

Q. Have you any personal knowledge of those transactions? A. Yes.

826 Q. Which of the transactions have you personal knowledge of? A. I have personal knowledge because if any change is made Mr. Magie tells me, and I see it is correct with the letters I have written to the other side.

Q. Aside from those changes that you refer to, have you any personal knowledge of the other items appearing on that page? A. Yes, I have.

Q. Well, why was it, before lunch, you stated you didn't have personal knowledge of page 37?

A. Because here——

Q. No, no; wait.

827 The Special Commissioner: He is giving his answer, "because here——"

The Witness: Because here I see those shares of Cripple Creek, whereas I said before I didn't know.

Q. What shares, Cripple Creek instead of what? A. Denver & Southwestern bonds.

Q. You have answered now, Mr. Kessler, that you have personal knowledge of all entries that appear on that page? A. I must have had at the time.

Q. Do you not now so state? A. I must have had at the time.

828 Q. Does the same answer apply to page 37 that you were questioned about before luncheon? A. Not according to Mr. Olney, because Mr. Olney said I could only have personal knowledge if I made the entries myself.

Q. Now, turn back to page 37. We are now on page 37. Have you personal knowledge of the entries you have made regarding Kessler & Company's account on page 37? A. I must have had at the time.

Q. And the entries you find there were correctly made at the time?

Mr. Elkus: I object to that. How does he know? He didn't make them.

The Special Commissioner: I have said, if you want to prove those entries, that this witness can refresh his memory; as to any transaction he knows about he can testify, his memory being refreshed by it. That is what I intended to hold. Why don't you call Mr. Magie? 829

Mr. Larkin: I have him here.

The Special Commissioner: Wouldn't it be better to suspend this witness's examination and call Mr. Magie. However, you can do as you desire.

Mr. Larkin: I think in an ordinary case I would do that, but I want to continue for a moment or two, very briefly, with this line of examination.

The Special Commissioner: All right.

830

Q. Now, Mr. Kessler, since the adjournment this morning have you been talking with anyone about this matter? A. No.

Q. What? A. No.

Q. You have not spoken with anyone on the subject of these accounts? A. No.

Q. Or in connection with your testimony this morning? A. I don't think so.

Q. Don't you know? A. I simply said to Mr. Magie just now, when we came in from lunch, he would be wanted as a witness on this escrow matter, is all.

Q. I call your attention to page 45, where a line is drawn through the line "Participation, Cincinnati, Hamilton & Dayton Syndicate," and ask you if you have any personal recollection of that transaction, and had at the time that line was drawn through there? 831

Mr. Elkus: You mean of the line or the entry?

Mr. Larkin: Recollection of the transaction, I said.

The Witness: I don't remember.

Q. I call your attention to the entry made, with a line through it, relating to St. Louis & San Fran-

277

832 cisco, and ask you whether you recollect that transaction? A. I don't recollect except we sold all these notes. They had to come out, but I don't know what date we sold them on.

Q. I call your attention to the transaction relating to two hundred shares of United States Leather Company with a line drawn through it, and ask you whether you recollect that transaction? A. No.

Q. Now, please look briefly down the whole page and see whether there is any entry there, or any transaction, which you have any personal knowledge of? A. No.

833 Q. Now, turn to the next page in that book where this account appears? A. Page 52.

Q. All right. I call your attention—I call your attention regarding the entry “Charles J. Devlin,” which has a line drawn through it, and ask you if you remember anything about that transaction? A. I see that it is taken out.

Q. What is that? A. I see that it is taken out, on April 13th.

834 Q. State what you recollect about it? A. I don't recollect much about the Devlin matter. The Devlin matter was a thing that belonged to Mr. Gillette. He brought it into the firm and guaranteed the firm against it, and eventually I think Mr. Gillette lost some money, but the firm didn't suffer by it.

Q. What does “out, April 13th” mean? Does that refresh your recollection? A. No.

Q. Whose handwriting is that “out April 13th” in? A. Mr. Magie's.

Q. I call your attention regarding the Midland Terminal Railway Equipment. Do you recollect anything about that? A. No, I think they were paid off.

Q. Whose handwriting is the words “out, March 1st,” in? A. Mr. Magie's.

Q. I call your attention to the next entry, which

has a line drawn through it, Colorado Trading & Transportation; have you any recollection of that transaction? A. The amount is changed from 30,000 to 25,500. 853

Q. Do you recollect that transaction? A. No.

Q. How about the Florence & Cripple Creek? Do you see a line through that? A. Yes.

Q. Do you remember that transaction? A. No, I don't remember any of these transactions.

Q. Now, briefly, just look at the other entries on that page which have lines through them and state whether you remember any of them? A. These were all paid off.

Q. Answer the question. I ask you not that they were paid off,—I ask you if you recollect any transaction which appears on that page which has a line through it? 836

Mr. McLaughlin: I object on the ground—I object to “any transaction which appears on that page”; I don't know what counsel means by “transaction.” There is nothing in the entry here that indicates—

The Special Commissioner: Does looking at that entry refresh your recollection as to any transaction connected therewith?

The Witness: No, I don't think it would.

The Special Commissioner: Go on with something else; he says he does not think it would. 837

Q. None of the entries which have lines through them refresh your recollection as to any of the transactions? A. No, except in a general way that some of these things were paid off.

The Special Commissioner: That is, as the securities matured?

The Witness: Yes.

Q. For instance, stock does not mature, does it? A. No, but they may have been sold.

Q. That is what the Referee wants to know? A.

838 I don't know whether they were sold or whether we took them out and put something else in their place.

Q. As to the other entries on that page which do not have lines through them, you have no recollection about them either, have you?

Mr. Elkus: Recollection of the entries?

Mr. Larkin: Of the transactions, I am speaking about.

The Witness: I don't know what you would call a transaction.

The Special Commissioner: Have you any recollection about them?

839 The Witness: I have no special recollection about them.

Q. What is the next page this account appears on in that book? A. 70.

The Special Commissioner: 70?

The witness: Yes.

Mr. Larkin: Yes, folio 70.

Q. Have you any recollection of the transaction, which is referred to, regarding the Cripple Creek Central, which has a line drawn through it? A. I have no special recollection, but it is in my handwriting and the stock was evidently going down and I marked it down from 70 to 61.

840

Q. That applies to both of these entries, does it?

A. No, the Common went up.

Q. Are the figures "70" in your handwriting?

A. No.

Q. Are the figures "61" in your handwriting?

A. Yes.

Q. Are the figures "33" in your handwriting?

A. No.

Q. Whose handwriting is "33"? A. Mr. Magic's.

Q. I call your attention to an entry further down on the page, \$5,096.63, referring to Chicago & Great Western. Do you remember that transaction?

Mr. Elkus: I don't understand what you mean by "transaction." I don't know whether the witness does or not. 841

The Witness: I don't know.

Q. Do you remember that transaction; can you answer the question? A. No, I don't remember exactly.

Q. Now, the other entries on that page which have no lines through them, have you special recollection of them?

Mr. McLaughlin: That is too indefinite.

Q. Do you recollect anything about the other entries on that page? 842

Mr. Elkus: I don't know what you mean. Do you mean whether they were written there correctly?

Q. Have you any recollection regarding the other entries on that page, except those which have lines through them. A. I have no special recollection. I recollect these things that were in the escrow.

Q. Is there anything on that page in your handwriting? A. Yes; I have just told you.

Q. What do you refer to? A. There are some more here later on.

Q. What words are in your handwriting? A. Well, here (indicating); this is my handwriting. 843

Q. Relating to Cripple Creek? A. Yes, and here, relating to reduction.

Mr. Elkus: You don't mean the words, do you?

The Witness: No words; the numbers.

Q. What else besides "reduction" and "Cripple Creek" are in your handwriting?

Mr. Elkus: The numbers.

Q. The numbers? A. In the reduction.

Q. What other than "Cripple Creek and reduction"? A. Chicago & Great Western B, simply a

844 line through there, a line drawn through there. B went up from 31 to 35 and I changed the price.

Q. You changed that price, did you? A. Yes.

Q. What is the next page this account appears on? A. 129.

Q. Do you find a line drawn through the entry regarding 200 shares of Columbia River Packing Company? A. No, I don't see it, but I suppose it is there because you say so.

Q. Just find it, will you?

Mr. Elkus: How far down is it? It is the first one through which a line is drawn.

The Witness: Yes, here (indicating).

845 Q. You find the entry, don't you. A. Yes.

Q. Do you recollect that transaction? A. Yes, I sold it.

Q. You sold what? A. The stock.

Q. Do you know when you sold it? A. No.

Q. Have you an entry there that it was sold on December 20th? A. Yes.

Q. Is that correct?

Mr. Elkus: I object unless he made the entry, or remembers it.

The Witness: If I didn't make it myself, it would be correct.

846 Q. In whose handwriting is the entry, "December 20th"? A. I think it looks like Mr. Magie's.

Q. Do you recollect when it was sold? A. No.

Q. Do you see the next entry regarding Cripple Creek, 468 shares, with a line drawn through it? A. Yes.

Q. Do you remember what that transaction was? A. No.

Q. I call your attention to the next entry, 390 Cripple Creek, with a line drawn through it. Do you recollect that? A. No.

Q. Do you see the entry regarding the United

States Reduction & Refining Company, Preferred? 847

A. Yes.

Q. Did you make the entry there? A. No.

Q. I show you an entry regarding the same Company, Common stock; did you make the entry there?

A. No.

Q. What? A. No, I didn't make it.

Q. I call your attention to a line drawn through "Orleans Quarry"; do you see that? A. Yes.

Q. Did you make that entry? A. No.

Q. I show you an entry, with a line drawn through it, Victor Fuel; do you recollect that transaction? A. No.

Q. Did you draw the line through it? A. No. 848

Q. Are the words "out December 24th" in your handwriting? A. No.

Q. Were those securities sold? A. Yes.

Q. Who sold them? A. Clarke, Dodge & Company.

Q. I mean who had charge of them? A. These identical ones, I don't know. I sold some, but I think Clarke, Dodge & Company sold those.

Q. Were Clarke, Dodge & Company your brokers? A. Our brokers?

Q. Yes. A. We did business with them.

Q. Did these securities belong to Clarke, Dodge & Company? A. No, it was a syndicate.

Q. Who had charge of the sale on your behalf in your office? A. Not one. It was a syndicate. Clarke, Dodge & Company had charge of them. 849

Mr. Elkus: They were the managers of the syndicate?

The Witness: Yes, they were the managers of the syndicate.

Q. You delivered 20,000 of this stuff to Clarke, Dodge & Company, did you? A. Yes.

Q. Did you do it personally? A. I personally, no.

850 Q. You don't remember the details of that transaction, do you? A. No.

Q. I call your attention to the entry regarding Indiana, Colorado & Eastern Traction with a line drawn through 23,500; do you see that entry? A. Yes.

Q. Do you remember that transaction. A. Yes.

Q. What was it? A. That was a syndicate that Drexel & Company, of Philadelphia, had, and we had a participation and we took that difference.

Q. You sold 13,000 of them, didn't you? A. They sold them.

851 The Special Commissioner: You delivered them?
The Witness: We delivered them.

Mr. Elkus: You never had them, I suppose, did you?

The Witness: Oh, yes, we had them.

Q. I call your attention to the line connecting 23,000 with Pittsburg, Westmoreland & Somerset. Do you see that line connecting those entries on the left-hand margin? A. I don't see any line.

Mr. Elkus: There (indicating); is it over there?

The witness: There is no line. Oh, you mean that (indicating)?

Mr. Elkus: The pencil mark.

852 Mr. Larkin: Yes.

The Witness: Yes.

Q. Do you remember the circumstances regarding that transaction? A. No, unless it was——

Q. You have 23,000; what does that mean? A. It means 45,000 instead of 23,000.

Q. Do you see a line drawn through the totals there? A. No.

Q. On the right hand margin? A. Well, that is something that has something to do with the addition, I suppose.

Q. Did you make that addition? A. No.

Q. I call your attention to the entries regarding

400 shares Kessler & Company, Limited, ordinary, 853
and 200 shares Kessler & Company, Preference—

A. That never belonged in there.

Q. Do you recollect the transaction? A. No,
there was no transaction.

Q. Who took it out?

Mr. Elkus: He said it never belonged there.

The Witness: It never belonged there.

Q. Who made the entry? A. I believe Bertie
made it.

Q. Who? A. Bertie Kessler made it.

Q. Is it in his handwriting? A. Yes.

The Special Commissioner: Was he a member 854
of the firm?

The Witness: No.

Mr. Elkus: He was an employee, wasn't he?

The Witness: Yes, an employee; he was simply
a confidential employee.

Q. Do you know whose shares they were, whose
property those shares were? A. They were my
shares, but they were "spouted"; they belonged to
the Estate.

Mr. Elkus: Spouted, pledged.

The Witness: Yes.

Q. To whose estate? A. To the estate of my 855
father, William Kessler.

The Special Commissioner: Well, they had been
distributed to you?

The Witness: Yes, they had been distributed, but
my brother wrote to send them back.

Q. You sent them back to secure a loan made to
you by the executors of your father's estate, is that
it? A. Yes.

Mr. Elkus: What has that to do with this case?
I move to strike it out.

856 The Special Commissioner: No, I will let it stand.

Mr. Elkus: Exception.

Q. What is the next page these entries appear on? A. 159 is the next, isn't it?

Q. Yes, 159 is the next. A. I guess that is it.

Mr. Elkus: The papers show.

The Witness: There are papers in every thing.

Q. 159 is he next? A. Well, all right, 159.

Q. Now, you find, Mr. Kessler, a line drawn through the two last entries on that page? A. Yes.

857 Q. 400 shares, Preference shares, of Kessler & Company, Limited; you find a line drawn through them? A. Yes.

Q. You find a line drawn through 200 Preference shares, Kessler & Company, Limited, do you not? A. Yes.

Q. Now, what is the date that appears on this page?

Mr. Elkus: I object to that.

The Special Commissioner: What is the object of that question.

858 Mr. Larkin: Going to show, Your Honor, that those Preference shares appeared on there on the 24th of August, 1906, and appeared on there a year afterwards, October 22nd, 1907, subsequently somebody took them out and that meant somebody had to supply something in their place.

Mr. Elkus: We don't claim them. What is the object of wasting time on it.

Mr. Larkin: I am proving the facts connected with this escrow.

The Special Commissioner: I suppose you will claim they mixed their own securities with the securities of these other people?

Mr. Larkin: The escrow is purely imaginary.

The Witness: May I say something?

Mr. Larkin: No, not now; later on you will have 859
a chance.

The Special Commissioner: What is your question?

Mr. Larkin: The question is whether it does not appear that the date of this last entry to which I have called his attention on folio 159 of this book bears the date of October 22nd, 1907. That was the date the whole thing was entered up, or probably the very day these securities were transferred; they put it down, and then somebody comes over afterwards and puts his pen through it.

Mr. Elkus: Did he do it?

Mr. Larkin: I am trying to find out. He probably did it himself. I don't know. I will ask him 860
in a minute.

The Special Commissioner: I will allow you to ask that question and give you an exception, Mr. Elkus.

Mr. Elkus: Exception.

Mr. Larkin: Read the question to the witness?

(Question read as follows:)

"Q. Now, what is the date that appears on this page?" A. On this page, we discussed that the other day—the 22nd of October.

The Special Commissioner: 1907?

The Witness: Yes. Also it is the same entry as 861
on this other one here (indicating).

The Special Commissioner: What page?

Mr. Larkin: Page 129.

Mr. Elkus: He asked about it.

Mr. Larkin: 129, Your Honor.

The Special Commissioner: It is not stricken out on page 129, is it?

Mr. Larkin: Yes.

The Witness: Yes.

Mr. McLaughlin: When we said we didn't claim those shares, we meant, of course, as part of this

862 escrow. We may other claims outside of this proceeding.

Q. Now, you have mentioned the fact that there is a line through there. Did you put that line through there yourself? A. No.

Q. Do you know who put the lines through those two entries? A. I caused the lines to be put through.

Q. Who put them there? A. Bertie Kessler. I said, "What did you put them down there for;" I said, "What did you put them down there for, they have nothing to do with this account."

863 The Special Commissioner: You told him then to erase it?

The Witness: It is a mistake. It has nothing to do with that account.

Mr. Elkus: It is a correction of your books?

The Witness: Yes, a correction of the books.

Q. What is the next page this account appears on? A. There are no more.

Q. Please look at folio 154? A. Yes.

Q. Well, do you find any entries on that page relating to Kessler & Company? A. Yes.

864 Q. I call your attention to the lines drawn under Orleans Quarry Company, September 20th, 20,000, and ask you whether you recollect that transaction? A. Yes. That was taken out.

Q. Did you take it out? A. No.

Q. What date was it taken out, do you know? A. It says here the 20th of September.

Mr. Elkus: I object to what it says here and move to strike that out. That is giving the contents of the book.

Q. Do you remember when it was taken out? A. No.

Q. You do remember it was taken out, don't you? A. Yes.

Q. But you don't know the date? A. No.

The Special Commissioner: Do you want that 865
stricken out?

Mr. Elkus: Yes, the answer in which he said, "It
says here, the 20th of September."

Mr. Larkin: I will consent to have that stricken
out.

The Special Commissioner: You don't know
yourself that that date is correct?

The Witness: No.

The Special Commissioner: Strike that out.

Q. I call your attention to the next entry regard-
ing the same Compnay. Do you see it? A. Yes.

Q. With a line drawn through it? A. Yes.

Q. Do you remember that transaction? A. No, 866
I don't remember that.

Q. You don't remember it? A. No, because you
said the other day we borrowed some money—

Q. Never mind. I asked you whether you re-
membered the transaction. Now, you said you
did not? A. I don't remember it personally, no.

Q. You don't remember whether the property was
sold, or what was done with it? A. I know it was
not sold.

The Special Commissioner: It was not what?

Mr. Larkin: It was not sold.

Q. Do you remember whether that property was
taken from what you call this escrow? A. Yes, 867
it must have been.

Q. I call your attention to the line through the
items regarding R. R. MacLea. Do you recollect
that? A. Yes.

Q. Do you know whether those items were taken
from that alleged escrow? A. Do I know?

Q. Do you remember whether those items were
taken from that escrow? A. Yes, they were.

Q. Were those notes collected? A. No.

Mr. Larkin: Now, I will withdraw this witness,
Your Honor.

The Special Commissioner: Yes.

868 WILLIAM E. MAGIE, called and sworn as a witness, testified as follows:

DIRECT-EXAMINATION:

EXAMINED BY MR. LARKIN:

The Special Commissioner: What is your full name?

The Witness: William E. Magie.

The Special Commissioner: Where do you reside?

The Witness: 352 Convent Avenue, New York City.

869 The Special Commissioner: What is your present occupation?

The Witness: Well, I am with the Receiver of Kessler & Company helping him with the books there.

The Special Commissioner: Formerly, what was your occupation?

The Witness: I was the Cashier of Kessler & Company.

The Special Commissioner: Not a member of the firm, but an employee?

The Witness: An employee, yes.

The Special Commissioner: And had been how long up to the time of the failure?

870 The Witness: Well, with a short intermission, for seventeen years.

The Special Commissioner: And what, during the last two or three years, or four years, was your special duty or employment?

The Witness: I was called the cashier. I had general charge of the securities and kept the books where the securities were registered and looked after them; I had charge of the inside of that department where the check-books were and everything of that kind.

The Special Commissioner: You had done that previous to 1903, in 1903 and previous thereto.

The Witness: Yes.

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The Special Commissioner: And down to the time of the failure?

The Witness: Yes.

By Mr. Larkin:

Q. Had you any books in which you kept a record regarding the securities? A. Yes, we had books where we kept a record of the securities.

Q. What are the names of those books? A. Owners of stocks and bonds, and a book called "Stocks," and a book called "Bonds."

Q. Did you have any book in which you kept a record of securities for loans made by you? A. 872
Made by Kessler & Company?

Q. Yes. A. Yes.

Q. What is the name of that book? A. We called it the loan book.

Q. You had a book in which you kept a list of the securities which you hypothecated? A. Yes.

Q. What book is that? A. The same book.

Q. How many loan books were there that you remember now? A. In all?

Q. Yes. A. I would not like to answer that question. I have seen three. I know of three that I could lay my hands on.

Q. I show you Exhibit for identification No. 4 873
and ask you, if you can, to identify that book and tell us what it is? A. This is the loan book, the last loan book, of the kind I have described that we had.

Q. Now, will you please turn to that book, if you can, and see whether you can find any entries relating to Kessler & Company of Manchester, and, if you can, find the first page in which those entries appear? A. There is an entry called the escrow of Kessler & Company on page 37.

The Special Commissioner: In your handwriting?

874 The Witness: Yes, in my handwriting.

Q. Now, was that book kept by you? A. Yes, in my handwriting. The book was kept by me, but there were other people that made entries in it occasionally, but as a rule, I made the entries.

Q. Now, will you look at that page 37, and state whether or not the entries appearing there are in your handwriting? A. They are.

Q. Were the entries correctly made at the time you made them? A. They were.

Q. Made in the regular course of business, were they, by you? A. Yes.

875 Q. They were correct when made? A. They were. I would like to say one thing with reference to that. There is a certain stock, I think, said to be in Manchester, and that I took not from personal knowledge, but from information.

Q. That is, certain of these securities were actually in Manchester? A. The second entry says 1606 shares of United Lighting & Heating Company were with Kessler & Company of Manchester. I have no personal knowledge they were there.

Mr. Elkus: The others you have personal knowledge of?

The Witness: Yes.

876 Mr. Larkin: I offer that page in evidence.

Mr. Elkus: May I ask a question before I see whether I will object or not. Mr. Magie, you made this entry?

The Witness: Yes.

Mr. Elkus: It represents a correct statement of the facts, doesn't it?

The Witness: Yes.

Mr. Larkin: I object. He can ask him whether those entries were correct when he made them.

Mr. Elkus: He says it is a correct entry of facts.

Mr. Larkin: There is the word "escrow" in there.

Mr. Elkus: With the exception of the word "escrow." 877

The Witness: I would like to know what the question is?

Mr. Larkin: I object to that form of question.

Mr. Elkus: I object on the ground we are not bound by it. I have objected on the ground it is irrelevant, incompetent and immaterial and not binding on us. I ask leave to ask the witness some questions in support of my objections.

The Special Commissioner: I don't see how you can put this in evidence as against Kessler & Company except on the theory that when this witness made the entry he knew the facts therein were true at the time he made it, would not have made it unless he had known they were true, and then it proves itself, but as simply books, while they are admissions against Kessler & Company, and perhaps against the Receiver, unless you show there is some fraud about it they are not evidence against Kessler & Company, Limited. They are not their books. You have not connected them with the entries. 878

Mr. Larkin: I think Your Honor will see by reading the correspondence these were books of original entry——

The Special Commissioner: Those are in evidence? 879

Mr. Larkin: No, but the letters are in evidence.

The Special Commissioner: That will not necessarily bring other documents in; it would not bring those books in.

Mr. Larkin: If Your Honor will consider the arrangement by which they were put in evidence——

Mr. Elkus: You have sustained my objection, Your Honor; there is no need of asking the question.

880 Mr. Larkin: I didn't know that the objection was sustained.

The Special Commissioner: He said, "I will make that objection," and then——

Mr. Elkus: I will make the objection; for the present I don't think I need ask any question.

The Special Commissioner: You will have to read what the witness testified about these entries, whether he has testified to enough.

(The stenographer reads as follows:)

"Mr. Elkus: May I ask a question before I see whether I will object or not. Mr. Magie, you made this entry?"

881

"The Witness: Yes."

"Mr. Elkus: It represents a correct state of the facts, doesn't it?"

"The Witness: Yes."

The Special Commissioner: He did answer the question. I don't see why they are not admissible.

Mr. Elkus: If I can ask him a question or two with reference to these stocks and bonds and things that are set forth on this page 37——Mr. Magie, when you made this entry in this book what, if anything, was done by you with reference to it?

882

The Witness: There was an original entry made, and afterwards a number of changes were made.

Mr. Elkus: This particular entry I am talking about, page 37. I don't mean changes; I mean before any changes were made.

The Witness: The original entry?

Mr. Elkus: Yes.

The Witness: I don't recall positively whether I did anything about them or not.

Mr. Elkus: Where were these securities?

Mr. Larkin: If you know?

The Witness: I know where they were. The securities were set aside.

Mr. Larkin: He didn't ask you what was set aside; he asked you where they were. I move to strike out "set aside." 883

Mr. Elkus: Where were they, in what condition were they; tell us all about it.

Mr. Larkin: Is this proper on his *voir dire*?

The Special Commissioner: No, I don't think so. They have already proved, or there has been some evidence, that they were put with a Safe Deposit Company in a separate envelope, and then they were asked to describe the endorsement on the envelope and that was objected to by Mr. Larkin and I ruled it out until——

Mr. Elkus: It is only a question of time; we want it corroborated by this witness—— 884

Mr. Larkin: You can at the proper time.

Mr. Elkus: Very well; I will rest on my objection. Now, if you will overrule it I will take an exception.

The Special Commissioner: Didn't you qualify him yourself by your question? Read that to Mr. Elkus.

(The stenographer reads as follows:)

"Mr. Elkus: May I ask a question before I see whether I will object or not? Mr. Magie, you made this entry?"

"The Witness: Yes."

885

"Mr. Elkus: It represents a correct statement of facts, doesn't it?"

"The Witness: Yes."

The Special Commissioner: I am with you that everything in these books, because it is in the books, is not evidence against Kessler & Company, but when you have a witness here who says those facts are true and knew them to be true when he made them, or would not have made them if he hadn't known them to be true—didn't you say you would

886 not have made them if you hadn't known them to be true?

The Witness: I don't think I was asked any such question.

The Special Commissioner: What is the fact?

The Witness: That is right.

Mr. Larkin: I offer in evidence page 37 of the loan book marked Exhibit No. 4 for identification.

Mr. Elkus: I make specific objection to the admission of any changes from the original entry. Let this witness identify it as it originally stood.

The Special Commissioner: Objection overruled.

Mr. Elkus: Exception.

887

Received in evidence and marked Receiver's Exhibit No. 6 of this date.

Q. Now, Mr. Magie, will you please refer to the next page in which this account appears? A. Page 45.

Q. Page 45? A. Yes.

Q. Are those entries on page 45 relating to Kessler & Company of Manchester in your handwriting? A. Yes.

Q. Were they made by you in the course of business? A. Yes.

888 Q. Were they correct when made them and did they correctly state the transactions when you made them? A. With the exceptions you called my attention to before, I don't know about the prices.

Q. Yes, but the entries regarding the securities correctly stated the facts at the time you made those entries? A. Yes.

Q. The entries made by you at the time correctly stated the facts at the time as you knew them to be, did they not? A. A question has been raised to what do you mean by "facts."

Q. Did you raise the question? A. No; I raise it now.

Q. Will you just take your directions from the Referee instead of Mr. Elkus? 889

The Special Commissioner: He did.

The Witness: If by "facts" are meant those stocks were in what we called the Kessler escrow, yes.

Mr. Larkin: I offer page 45 in evidence.

Mr. Elkus: Exception. I except to the changes and alterations that were made any time after the entry was apparently made, October 24th, 1904.

The Special Commissioner: The same ruling.

Mr. Elkus: I object to the changes and alterations that were made any time after the entry was apparently made, October 20th, 1904. 890

The Special Commissioner: Objection overruled.

Mr. Elkus: Exception.

Q. Will you kindly turn to the next page that this account appears on? A. Page 52.

Q. Now, these same answers apply to this page that you have made to pages 37 and 45? A. They do.

Mr. Larkin: I offer page 52 in evidence.

Mr. Elkus: The same objection, ruling and exception.

The Special Commissioner: The same ruling.

Mr. Elkus: Exception. 891

Q. Will you kindly refer to the next page? A. Page 70.

Q. The same answers you have made to the prior pages, 37, 45 and 52, apply to this page as well, do they not, Mr. Magie? A. Yes.

Q. And the same answers apply also to the remaining pages of the book, 129, 159 and 154? A. No; on page 129 the re-writing of the escrow is in the handwriting of my assistant, Mr. Albert Katt.

Q. But the original entries are in your handwriting? A. No; I say what I call re-writing the

892 original entry on that page; if you will look at the handwriting you will see it is different.

The Special Commissioner: That is, under the heading?

The Witness: No.

The Special Commissioner: The whole thing.

The Witness: I had him copy it off and put it down to save me the trouble of doing it.

Q. None of the entries on page 129 are in your handwriting? A. Some of it, the changes; not the original entries.

893 Q. Beginning after the footing, 539, 010, about the middle of the page; is your handwriting below or above that? A. The entries below that are in my handwriting with the exception of the two last entries on the page.

Q. And the answers regarding such part of the page as is in your handwriting that have been made by you regarding the prior pages apply to this? A. Yes.

Q. Where is Mr. Albert Katt? A. I don't know where he is now. He was with Kessler & Company until October 30th of this year and then his services were no longer needed. His home is in Union Hill, New Jersey.

894 Q. Were you away in August, 1906, do you recollect? A. I think not. I don't recall, but I think I was present when that was written as it is here.

Q. You were present? A. I think I was.

Q. Can you state whether or not the entries were correctly made by Mr. Katt in this book? A. Those entries there extended to the securities that I understood to be set aside for the Kessler escrow?

Mr. Elkus: You say "understood;" you mean "knew?"

The Special Commissioner: I think that is a very proper answer. Why isn't that according to the facts?

Mr. Elkus: I am not objecting. I am asking if 895
when he said "understood" he meant that he
knew it.

Mr. Larkin: You can ask him that later on.

The Special Commissioner: It is certainly com-
petent evidence as to what he actually did with
those securities, or saw some one else do with them.

Mr. Elkus: I am not quarreling about that at all.

Mr. Larkin: I offer in evidence page 70.

Mr. Elkus: We make the same objection and ex-
ception to each of the pages.

The Special Commissioner: Objections over-
ruled.

Mr. Elkus: Exception.

896

Received in evidence and marked Receiv-
er's Exhibit No. 9 of this date.

Q. Now, with the exceptions of the entry made
by Mr. Katt on page 129 the same answers made
to prior pages apply to page 129? A. No.

Q. What is the difference? A. There are two
entries not made by either me or Mr. Katt.

Q. What entries are they? A. 400 shares, Kess-
ler & Company, Limited, ordinary shares.

Q. In whose handwriting are those entries? A.
Albert Kessler's.

Q. Bertie? A. Yes; Bertie, he is so-called; his
name is Albert.

897

Q. Now, with those exceptions you have referred
to, the answers you have made to the prior pages
apply to this page? A. With those two exceptions,
yes.

Mr. Larkin: I offer that page in evidence, page
129, with the exception of the entries made by
Bertie Kessler.

Mr. Elkus: I object to those entries because in
my view of it they were not entries at all.

The Special Commissioner: The same ruling and
exception.

898 Mr. Elkus: Exception.

Received in evidence and marked Receiver's Exhibit No. 10 of this date.

The Witness: May I say a word about that?

Mr. Elkus: I will ask you about it.

Mr. Larkin: You will have plenty of time to talk of that later on.

Q. We will now turn to the next folio. A. 159; the continuation of these entries made on 159—there is an entry on the page between.

The Special Commissioner: That is something new.

899 Q. What is that? A. Special escrow on page 154.

Q. Now, do the same answers which you have made to the prior pages in this book apply to folio 159? A. No.

Q. What is the difference? A. The difference is none of it is in my handwriting.

Q. In whose handwriting is it? A. Mostly in that of Mr. Albert Katt's; he made the entries at my direction.

Q. Do the entries correctly state the facts at the time they were made? A. Those made by Mr. Katt, yes. In addition to that there are two items at the bottom in Bertie Kessler's handwriting.

900

Mr. Larkin: I offer that page in evidence with the exception of Bertie Kessler's handwriting.

Mr. Elkus: The same objection and ruling.

The Special Commissioner: The same ruling.

Mr. Elkus: Exception.

Mr. Larkin: That was page 159.

Mr. Elkus: The same objection.

The Special Commissioner: The same ruling.

Mr. Elkus: Exception.

Received in evidence and marked Receiver's Exhibit No. 11 of this date.

Mr. Elkus: I understood you to say these entries 901
you have testified to correctly state the facts to your
knowledge?

The Witness: As I understood the facts, yes.

Mr. Elkus: The objection is overruled, I suppose?

The Special Commissioner: Yes.

Mr. Elkus: Exception.

Q. I call your attention to page 154? A. Yes.

Q. Are the entries on that page in your hand-
writing? A. Yes.

Q. Will the same answers which you have made
in regard to the prior pages of this book apply to
this page? A. Yes.

Q. There are no entries made by Mr. Bertie Kess- 902
ler or Mr. Katt on this page, are there? A. To be
sure I will look at it. Of course, there are a few
figures that do not look like mine, but I guess they
are.

Mr. Larkin: I offer page No. 54 in evidence.

Mr. Elkus: The same objection and ruling.

The Special Commissioner: The same ruling.

Mr. Elkus: Exception.

Received in evidence and marked Receiver's
Exhibit No. 12 of this date.

Mr. Larkin: That's all.

Mr. Elkus: If Your Honor please, I prefer to 903
defer the cross-examination until I have finished
with Mr. Kessler.

The Special Commissioner: Have you any objec-
tion?

Mr. Larkin: This witness has only been called
upon the question of the books.

Mr. Elkus: That is what I know. That is why I
prefer to defer the examination. It is now near
four o'clock. I am not very familiar with the de-
tails of the case, have just been called into it and
should not like to enter upon the cross-examina-
tion now.

904 The Special Commissioner: You can examine him about the entries, and then take an adjournment; it will not take you long.

Mr. Elkus: I had rather adjourn because I have made an appointment at four o'clock that I want to keep—with some people coming from Philadelphia.

The Special Commissioner: That is another thing. Have you any objection to adjourning now?

Mr. Larkin: No.

Adjourned to Saturday, December 7th, 1907, at 10 A. M.

905

NEW YORK, December 7, 1907, 10 A. M.

Met pursuant to adjournment.

Same appearances.

906 Mr. Seymour: Mr. Referee, I desire to make a statement in regard to Mr. Alfred Kessler. Mr. Kessler will not be able to attend here this morning, as he is confined to the house by an attack of the grippe. I wish to say further, that after we left here on Wednesday night, Mr. Kessler, Mr. Flinsch and myself went over all the letters, correspondence and documents in the office down stairs between Mr. Kessler and Mr. Flinsch, and found a cablegram there which was received by Flinsch on the morning of the 26th of October. I have not been able to find from the Cable Company when the cable was sent. It was a cable telling Flinsch the conditions here, general financial conditions, and also asking him if he could raise money, and Mr. Kessler will produce that at the next hearing.

WILLIAM B. MAGIE (resumed).

907

CROSS-EXAMINATION CONTINUED BY MR. ELKUS:

Q. Mr. Magie, you had especial charge of the stocks and bonds which belonged to the firm of Kessler & Company here? A. I was generally in charge of that. I was in general charge of them.

Q. You knew whatever disposition was made of them?

Mr. Larkin: I don't think that is proper. I object to that on cross-examination.

Objection sustained.

Q. Mr. Magie, with reference to the shares of 908 stock which were set apart for Kessler & Company of Manchester, did you have personal charge of setting apart those securities?

Mr. Larkin: I object to that question as to what was set apart. I object to his putting in the witness's mouth that they were set apart, until there is something that will warrant that description.

The Special Commissioner: Why not call them the escrow securities?

Mr. Larkin: I object to them being called set apart—putting the words into the witness's mouth.

The Special Commissioner: You don't object to them being called escrow securities? 909

Mr. Larkin: No, not at all. I object, however, to his describing them as being set apart.

Objection sustained. Exception.

Q. What did you do, if anything, with reference to the securities about which you have testified and referred to as being transactions with Kessler & Company of Manchester? A. You mean as regards the whole thing or as regards any specific—

Q. As regards the securities which are set forth on page 37 of the Loan Book, about which you have testified? A. May I see the page?

910 Q. What did you do with those securities? A. I have no definite recollection about the first securities that are entered—whether I had anything to do or not about setting them aside. Further on—

Q. Prior to this entry, prior to this date, page 37, April 15th, 1904, were there any securities in your possession or were there any securities of which you had knowledge which were held in any way by Kessler & Company here for Kessler & Company of Manchester?

911 Mr. Larkin: I object to that question, if the Court pleases. These securities have been traced by the correspondence right down to the 30th day of June, and he can start and ask a proper question as to the securities ratified by the letter of the 30th of June, which is concededly the first transaction on this subject, and ask him what he knows about those securities and what were done with them. I think that is the proper way to put this question.

The Referee: I do, too, Mr. Elkus.

Objection sustained.

Mr. Elkus: Exception.

912 Q. Do you know of any securities being set aside or not for Kessler & Company of Manchester, prior to April 15th, 1904?

Mr. Larkin: I object to that on the ground—

The Referee: He asks him if he knows.

Mr. Larkin: But he says whether he knows of any securities being set aside. There is only one answer to that question. In case he answers yes, he concludes that they are set aside, which is one of the facts to be proven in this case and which is a legal proposition. Aside from being a statement of fact, it is a legal proposition of whether the securities have been set aside as a matter of law. Now, he is asking this witness to testify not as to facts, but as to legal conclusions.

The Referee: Yes, that is so.

913

Objection sustained.

Mr. Elkus: Exception.

Q. Do you know of any securities prior to April 15th, 1904, with which Kessler & Company of New York had dealings with Kessler & Company of Manchester? A. I have no recollection as to a fixed date.

Q. Prior to that entry on page 37? A. I have no recollection on that point.

Q. Do you know whether or not any securities were held—whether there were any securities about which there were dealings between the two concerns, Kessler & Company of New York and Kessler & Company of Manchester, prior to April 15th, 1904? I am not asking you for any specific date. I am asking you whether you know? A. I cannot say at what date my attention was first called to the fact of the securities being put in the Kessler escrow. 914

Q. But you know where the securities about which you were questioned, a list of which appear on page 37 on the day of April 15, 1904, in the Loan Book of Kessler & Company of New York, were, on April 15, 1904? Just answer yes or no. Do you know where they were? 915

Mr. Larkin: Do you understand that question, Mr. Magie?

The Witness: My difficulty in understanding is that I cannot recall at what date we changed our vaults?

Q. In 1904 or thereabouts, did Kessler & Company of New York have safe deposit boxes in any vaults? A. Yes, sir.

Q. In which ones? A. I do not recall whether it was in the State Deposit Vault or in the North American National Safe Deposit Company.

916

Q. One or the other? A. Yes. We had other vaults, but we had vaults in one or the other at that time.

Q. And these securities which are referred to on page 37, were they in a safe deposit box? A. They were kept in a bundle by themselves in either one or the other of these safe deposit boxes.

917

Q. The securities to which I referred are those which are set forth on page 37, and with the exception of 1606 shares of United Lighting & Heating stock, which is marked here "K. & Co., Manchester," were all those securities in one vault in some deposit box or tin box, in the vault of either one of the companies which you mentioned at that time? A. All of these securities were not in them at that time, because the changes were made from time to time. Some securities were withdrawn, and others put in to replace them.

Q. On the 15th day of April, when you made that entry, before it was corrected, did it not correctly state the securities that were held in some way for Kessler & Company of Manchester? A. It did.

918

Q. And on that particular date, all those securities, with the exception of those that are marked as being in Manchester, were together, weren't they? A. All that were entered at that time, at that first date, yes, sir.

Q. Where were these securities? A. Put in a package by themselves on a shelf in the vault of either one of the two Safe Deposit companies—put in a package by themselves in a vault.

Q. Put in a package by themselves in a vault? By whose direction, if anybody's, did you put those in that package? A. I do not think I put them there myself.

Q. Who put them there? A. Mr. Horace Bacon.

Q. Who was Mr. Horace Bacon? A. He was at that time the confidential man—I should say general manager of our office.

Q. Was he your superior? A. He was. 919

Q. Did you see them there? A. Yes.

Q. Will you describe the package in which they were contained? A. There was——

Mr. Larkin: What date are you speaking of now?

Mr. Elkus: April 15th, 1904.

The Witness: I do not say that I saw them there on that date.

Q. About that package, now—— A. I saw the package there on that shelf at various times.

Q. Describe the package? A. The package was bonds and stocks——

Mr. Larkin: Do not say what was written on the package, whether it was blue or green or yellow. 920

The Witness: There was a package of bonds and stocks held together by an elastic, in one of Kessler & Company's envelopes, with a list of the stocks and bonds on it.

Q. Have you got that envelope? A. I have not.

Q. Have you made any search for it? A. I have not.

Q. Do you know whether it has been destroyed? A. I think that it is the first one.

Q. Will you tell the Referee what was written on that envelope, if anything? A. I don't think that—— 921

Q. Do you know whether or not that first envelope was destroyed? A. I do.

Q. Was it destroyed? A. It was.

By the Special Commissioner:

Q. When and why? A. A good many changes—I cannot give the dates, sir——

Q. Who destroyed it? A. Either I or Mr. Bacon; I think I did.

922 By Mr. Larkin:

Q. When was it destroyed? A. At the time that a new envelope was made out. I cannot give the date.

By Mr. Elkus:

Q. Why was it destroyed? A. Because there had been so many changes in the escrow that the old envelope could not contain the changes, and they made out a new envelope changing the escrow as it was at the time the envelope was made out.

923 Q. You say the list of securities had changed so that you destroyed the envelope. Was a duplicate list of the securities as they appear on page 37, with the exception of those securities that were in Manchester, placed on the outside of this envelope?

The Special Commissioner: You mean the new one?

Mr. Elkus: On the old one, the destroyed one.

A. I did not say that. I said I do not recall what was done. We made out a new envelope and put it in the package. The package was a large one. The bonds could not go in the envelopes. Most of the stocks if not all of them were in the envelope.

924 Q. Now, coming back to the first envelope that was destroyed, that contained the securities, which are set forth under date of April 15, 1904, or was annexed to it, will you tell the Referee what was placed upon that envelope? A. A list corresponding to the list here.

Q. What else, if anything? A. My recollection is that "escrow, Kessler & Company, Manchester."

By the Special Commissioner:

Q. Is that recollection pretty definite? A. Yes, sir.

By Mr. Elkus:

925

Q. Now, after that, you say a new envelope was made out. Do you know what has become of the second envelope? A. I do not.

Q. Can you tell the Referee whether or not a new envelope was made out at or about the time when these statements of securities which were placed in the way you have described was rewritten in the Loan Book? A. Not always.

Q. How many envelopes have been written since April 15th, 1904? Can you tell us? A. My recollection is that there were four envelopes really, but I am not positive.

Q. Now, do you know whether any of those envelopes, except the last one, have been saved, or have they been destroyed? A. I think they were all destroyed. Yes. 926

Q. Now, will you tell the Referee the contents of the statement that was upon each envelope other than the one that is now in existence?

Mr. Larkin: I think he ought to go a little bit more into the knowledge as to how they were destroyed.

Q. Do you know whether they were destroyed, except the last one—whether it is now in existence? A. I know that, in the ordinary course of business, they would have been destroyed. I cannot answer more positively than that. 927

By Mr. Larkin:

Q. You did not do it yourself? A. I think I did.

By Mr. Elkus:

Q. Is it your best recollection that you did destroy them? A. Yes.

Q. In the ordinary course of events, you would destroy them? A. Yes.

Q. And the fact that there was a new one would

928 indicate to your mind that the others had been destroyed? A. It would.

Q. Now, will you please tell the Referee what was placed on the envelopes which were destroyed? A. Well, my best recollection is that it was "Escrow, Kessler & Company, Manchester," and then a list of the securities with the valuation placed on them.

Q. Were there not placed upon the envelopes the words "Property of Kessler & Company, Limited, of Manchester?" A. I have no recollection of that.

Q. Mr. Magie, can you produce the envelope now in existence which is in the vault?

929 Mr. Larkin: I will consent to the entry of an order that it be produced.

Q. Did you yourself write upon each envelope? A. No, sir.

Q. Who did the writing? A. I think Mr. Bacon wrote on the first one.

Q. And on the second? A. I think I wrote on the others.

Q. All the others? A. Possibly the last one was written on by my assistant. I do not recall about that.

By the Special Commissioner:

930 Q. Who is that? A. Mr. Katt.

By Mr. Elkus:

Q. You don't know whether you did it or not? A. I do not recall about the last one. I know I did write on some of them.

Q. With the exception of the list of securities was one envelope a copy of the others? A. I cannot say as to that. It probably would have been. I do not recall positively, but it naturally would have been, and—— I do not recall.

Q. Did you make the substitutions of securities

from time to time? A. Some of them, but not most of them. 931

Q. When I referred to the substitutions I mean did you yourself go to the vault and take out the securities? A. My answer was with that understanding.

Q. And as to those which you did not substitute yourself, did you have knowledge of them? A. I did.

Q. And from that knowledge, did you make the corrections by striking out the securities as they appear in the Loan Book? A. I did.

Q. With reference to the shares of the United Lighting & Heating Company, 1606 shares, where were those shares in April, 1904? A. I was informed they were in Manchester. 932

Q. Who informed you? A. My recollection is Mr. Alfred Kessler.

Q. And with whom were they in Manchester? A. Kessler & Company.

Q. Limited? A. Yes, sir.

Q. Were they ever afterwards delivered by Kessler & Company of New York? A. Not to my knowledge.

Q. By whose direction did you make this entry, "Kessler & Company of Manchester," and what did you do with the securities referred to on page 37? A. Either Mr. Bacon or Mr. Alfred Kessler—I cannot recall who—gave me the information regarding that original entry. 933

Q. Do you know whether, prior to the entry on page 37, there were or were not securities which were placed in an envelope or attached to an envelope, the same as these securities were attached or placed in April, 1904? A. I do not recollect clearly about dates. My recollection is that the securities in the escrow had been there sometime before the entry was made in the book.

Q. Where were these securities to which you

934 have referred as being in escrow or placed in escrow prior to the entry in the book? A. They were always kept in one place, that I have described before, on the shelf in the vault—either the State vault or the North American Safe Deposit vault.

Q. The entry on page 45, under date of April 14, 1904, is in your handwriting, is it not? A. It is.

Q. And did you compare the list of securities at that time in the vault which you have referred to with this list? A. I do not recall. I didn't compare the list with the envelope, but I do not recall that specific date.

Q. At or about that time did you compare—
935 A. I do not say that. I say at several times I did compare the list of securities and checked them up.

Q. When you compared it, did you find it to be correct or not? A. I did.

Q. I notice, in looking through this book, Mr. Magie, that some entries are made in red ink and some are made in black ink. Was there any reason for that? A. There was.

Q. Will you tell the Referee what it was? A. When Kessler & Company loaned money to other people we made entries in black ink. When Kessler & Company borrowed money or put securities in escrow we made the entries in red ink.

Q. In which ink are all the entries referring to
936 Kessler & Company of Manchester? A. Red ink.

Q. I notice on page 80 in this loan book, under date of October 18, 1905, an entry beginning "Central Trust Company escrow." Is that in your handwriting—the two entries "Central Trust Company?"

Mr. Larkin: I object, if the Court pleases, to any introduction of evidence as to any other transaction of a similar kind which they may have had with other institutions. This is the Central Trust Company.

The Special Commissioner: This is not the August escrow? 937

Mr. Larkin: We are not dealing with Manchester escrows at all. They are asking him to identify an entry which is headed "Escrow." I submit that any evidence of another transaction, of a similar transaction, has no bearing on this subject. It is irrelevant.

The Special Commissioner: Objection sustained.

Mr. Elkus: This question is simply preliminary. I am asking him whether this is in his handwriting.

The Special Commissioner: He can say that, of course.

Mr. Elkus: I would like to say a word upon the question whether it is relevant or not. 938

The Special Commissioner (to the Witness): You can say whether or not it is.

The Witness: It is.

Q. Did you have knowledge of the transaction? A. I did.

Q. What was the transaction?

Mr. Larkin: I object to it as incompetent, immaterial and irrelevant.

Mr. Elkus: The purpose of that was in regard to the use of the word "Escrow" as describing a transaction by this firm and to show their practice with reference to it—what was done under that practice. 939

The Special Commissioner: We do not care about that. It would not make any difference to us. Whatever they call that, it would not make any difference to you or anybody else. The question is not what they called it, but what they did. You would not like if they called it an escrow and it turned out not to be an escrow. You would not like to have your case thrown out of court on any such account. If what they did constituted a legal lien, why, then, that is in the line of your case.

Mr. Elkus: I may have an exception?

940 The Special Commissioner: Yes; and exception to Mr. Elkus.

Q. I call your attention to page 70, July 15, 1905, which is in evidence—Receiver's Exhibit 9—and ask you whether or not the actual securities except those marked "Held in Manchester," as stated on this page, were then in existence, and where they were? A. They were in existence, and, with the exception of 10,000 shares of Elkton Consolidated Mining Company, were in the vault where I have said.

Q. Either in or attached to an envelope? A. Yes, sir.

941 Q. Is that one of the envelopes that have been destroyed? A. Well, they were all destroyed, except the last one, I think. My recollection is that they were.

Q. And where was that stock? A. With the parties that bought it for us in Colorado Springs, Shove, Aldrich & Company.

By the Special Commissioner:

Q. You mean—— A. I mean we have left it in their possession.

By Mr. Elkus:

942 Q. They held it for whom? A. For Kessler & Company.

Q. Why didn't it come into your possession, if you know? A. The only market for the stock was out there. In case they wanted to sell it, it could be sold there, and also for convenience in collecting dividends.

Q. They held it for Kessler & Company here?

Mr. Larkin: I object to it.

Mr. Elkus: I will withdraw the question.

Q. They did not loan it—the people out there?

A. They did not.

Q. Was it sent here at any time afterwards? A. 943
It was.

Q. Did you receive it? A. I did not.

Q. Who did, if you know? I mean, did you get it finally? A. It did not come into my hands—not my hands personally.

Q. But you knew it arrived here? A. I was informed that it had.

Q. By whom? A. Mr. Alfred Kessler.

Q. Did you know when it arrived? A. I do not. I know it was in October, but I do not know the date.

Q. October of what year? A. This year.

Q. And did you have anything to do with it when 944
it did arrive? A. No, sir.

Q. Do you know where it was put? A. No, sir. I will modify that. I was told it was put in the Kessler vault.

Mr. Larkin: I move to strike it out.

The Special Commissioner: Yes, strike that out.

Q. I call your attention to an entry on page 123, under date of May 15, 1906, headed "Eserow, New York Trust Company, Louis Dreyfus & Company," and ask you whether that entry is in your handwriting? A. Yes, sir.

Q. Do you know whether or not Kessler & Company of Manchester had anything to do with that 945
transaction?

Mr. Larkin: I object to that question.

The Special Commissioner: The same ruling; it is irrelevant.

Mr. Elkus: Exception.

Q. Do you know whether or not the stock referred to in this entry on page 123, under date of May 15, 1906, referred to here as 2,550 shares of Cripple Creek, Central Common, and 3,225 shares of the same preferred, was or was not placed with the New York Trust Company, to be held for Louis

- 946 Dreyfus & Company, and that Kessler & Company of New York had the right and did exercise that right thereafter to substitute other stocks for the same?

Mr. Larkin: I object to it on the ground that it is irrelevant and immaterial.

The Special Commissioner: Same ruling.

Mr. Elkus: Exception.

I would like to have those two entries about which I have spoken marked for identification.

- 947 The entry on page 80 referred to by Mr. Elkus was accordingly marked Kessler & Company, Limited, Exhibit D for identification, and the entry on page 123 was marked Kessler & Company, Limited, Exhibit E for identification.

Q. Did you have anything to do with the correspondence, if any, that took place between your firm and Louis Dreyfus & Company, of Paris, with reference to the stock to which I have referred?

The Special Commissioner: You may answer that, whether you had anything to do, yes or no.

The Witness: Correspondence between Dreyfus & Company of Paris, and Kessler & Company of New York?

- 948 Q. Yes, sir. A. No.

Q. Did you have anything to do with the correspondence between your firm here and Kessler & Company of Manchester? A. No, sir.

Q. When changes were made, substitutions made in the stocks which you have referred to in your testimony as being placed on a shelf in a vault for Kessler & Company of Manchester, what did you do with reference to notifying anybody of such changes? A. I received instructions from Mr. Alfred Kessler when changes were made. There were no changes made without his instructions.

Q. And did you or did you not report to him 949
when the changes were made? A. If Mr. Kessler
instructed me to make a change, I, as a rule, told
him I had done so—that it was made.

Q. You did the physical work of exchange? A.
Sometimes, but not always.

Q. Of going to the vault and taking them out?
A. Yes.

Q. Who else did it? A. Sometimes Mr. Bacon
did while he was there. Since then, Mr. Bertie
Kessler did it.

Q. When did Mr. Bacon come with your firm?
A. He left on May 1st, 1906.

Q. When did he come with your firm? A. I 950
do not know when he came.

Q. Was he there before you came? A. He was.

Q. And during all the time you were there, he
was there? A. He was there.

Q. Do you know whether or not any representa-
tive of the firm of Kessler & Company of Manches-
ter was in this country at any time prior to Octo-
ber of this year and made any inspection of these
securities referred to on these pages? A. I do.

Q. Who was it? A. Mr. P. W. Kessler.

Q. When was he here? A. I do not recall the
date.

Q. How long was it prior to 1907—how many 951
years or months? A. Well, my recollection is about
two years ago, but I am not at all clear as to the
time.

Q. Was it the last visit which Mr. P. William
Kessler made to this country which you know of?
A. Yes.

Q. Did Mr. P. William Kessler ever examine
them more than once? A. I do not know as to
that.

Q. I mean at different times, different visits.
Was he here once or more than once, to your knowl-
edge? A. My recollection is only once. It may

952 have happened more than once, but I have no other recollection than that.

Q. Will you tell us what happened upon that occasion, if you know? A. I brought him a list of the securities and checked them up. I think that my recollection is that the securities were brought over from the office for his convenience and taken into the private office and gone over by him and checked up.

Q. Did you bring them over or did you see them brought over? A. I do not recall whether I brought them.

953 Q. Did you see him check them off? A. No, sir. He spoke to me about some of them.

Q. Did he discuss the particular securities? A. He asked me some question about one or two of them. I do not recall what his questions were. I know I had some conversation with him about it.

Q. Do you remember a Mr. Youatt visiting this country? A. No.

Q. Do you know him? A. No, sir.

Q. Do you remember an accountant from the firm of Kessler & Company, Limited, visiting this country in 1904? A. I have no recollection of it.

954 Q. Do you remember anybody else other than P. William Kessler examining the securities which you have testified about any time between 1903 and 1907? A. My only positive recollection is the one which I have stated. Whether anyone was with Mr. P. W. Kessler at that time, I cannot recall.

Q. Do you have anything to do with keeping the ledger of the firm of Kessler & Company? A. No.

Q. Or did you? A. Writing into it, do you mean?

Q. Yes. A. No, sir.

Q. Was it kept under your supervision? A. No, sir.

Q. What books were kept under your supervision or by you? A. This loan book; the books we called

"Owners of stocks and bonds"; a book called 955
"Stocks"; a book called "Bonds," and one or two
other books that had reference to transactions with
syndicate dealings; a book called "Domestic drafts
book"—that is, received for collections—domestic
collections, I think the name was—domestic collec-
tions. There may have been one or two others;
I do not recall.

Q. Did you have anything to do with keeping the
books in which was recorded the drafts drawn on
Kessler & Company of Manchester? A. No.

Q. Did you have anything to do with these trans-
actions? A. No.

Q. Who had charge of those transactions? A. 956
Mr. McLean is general manager of our office. He
had general charge. The clerk who had charge of
those books was Mr. Max Pardon.

Q. Where is he now? A. The last I knew, he
was with one of the Exchange brokers. I could
ascertain if desired.

Q. Mr. Max Pardon kept the particular book in
which was entered the records of drafts drawn by
Kessler & Company of New York on Kessler &
Company of Manchester? A. He kept the record
of all the drafts drawn by Kessler & Company on
the foreign correspondents.

Q. I call your attention to page 129, under date 957
of August 24th, 1906. Is that in your handwriting?
A. It is—well, not entirely. The first part of it is
in Mr. Katt's handwriting.

Q. You testified it was made under your direc-
tion and was correct? A. Yes.

Q. Page 129, under date of August 24, 1906—
taking the first part, that is in Mr. Katt's hand-
writing. Do you know whether or not the securi-
ties as stated here were placed in or attached to an
envelope bearing the name of Kessler & Company,
Limited, of Manchester, with the exception of the
stock which you have testified was in Manchester?

958 A. With the exception of the 10,000 shares of Elkton Consolidated Mining Company stock.

Q. And that is the same 10,000 shares about which you have already testified? A. It is.

Q. Now, on the same page, under date of September 12th, 1906, are some entries, which I think you have testified to are in your handwriting?

(Witness examines book.)

A. Yes, they are.

Q. Were all the securities which are under date of August 24, 1906, in existence at that time, except those to which you have referred? A. They
959 were all in existence.

Q. And were they all in the vault in one of the Safe Deposit Companies, either one of those to which you have referred? A. Excepting the stock said to be in Manchester and the 10,000 Elkton.

Q. About which you testified? A. Yes, sir.

Q. Were the securities either in or attached to an envelope? A. They were.

Q. And is that one of the envelopes which has been destroyed? A. I think it is, but I am not positive.

Q. Is that your best recollection—that it is destroyed? A. I have no recollection. I am simply
960 going——

Q. By the ordinary course of business? A. Yes, sir.

Q. Where would the envelopes be if they were not destroyed? Where could they be found? A. They probably would have been—they would naturally have been brought to me, and, if I had not destroyed them, I would have kept them in a little closet I have there.

Q. Have you looked in that closet to see if they are there? A. I destroyed all the old envelopes which were there before the auction sale of Kessler & Company's furniture.

Q. You know they have been destroyed? A. No, 961
I do not say that.

Q. That is the only place they would be if they
were not destroyed? A. The only place that I
know of.

Q. Isn't it now your best recollection, after hav-
ing your mind refreshed by the questions that, if
they were in existence, they would be in the closet
—that these envelopes, with the exceptions I have
mentioned, which are going to be here in a few
moments, have been destroyed? A. I am not sure
that this is not one of the envelopes.

Q. That is going to be produced over here? A. I
am not sure whether it is or not. 962

Q. Under date of September 12, 1906, page 129,
is a list of securities in your handwriting. Were
those actual securities in existence—only those in
your handwriting—— A. You mean just under
that one date?

Q. Yes. A. Yes, sir, they were.

Q. And is November 16 in your handwriting? A.
Yes, sir.

Q. December 31st your handwriting? A. Yes,
sir.

Q. February 18th, 1907, and June 11th and July
8th and August 13th? A. Those are all in my
handwriting. 963

Q. And were those securities in existence on those
respective dates? A. There is a ditto here not in
my handwriting.

Q. I am not asking you about the lines which
are stricken out? A. It is under the date.

Q. And especially under the date—I mean as to
those two lines, referring to 400 shares of—what
is it? A. 400 shares Kessler & Company, Limited,
ordinary, and 200 shares——

Q. I except those from my questions. All the
other securities were in existence on those dates

964 and in your possession? Did you see them? A. I did.

Q. And where were they? A. After these entries were made, they were in this bundle that I have described that is on the shelf in the vault.

Q. Attached to or in an envelope? A. Yes, sir.

Q. Marked in some way? A. Yes, sir.

Q. Were they put in the same envelope as the securities which are under date of August 24, 1906? A. I do not recall at what time—whether that envelope is still with them or whether it has been destroyed. When I see the envelope I can answer the question positively.

965 Q. Referring to page 159, which is in evidence, under date of October 22nd, 1907, that is not in your handwriting, is it? A. None of that is in my handwriting.

Q. That is in the handwriting of Mr. Katt's? A. Except the last two entries on that page.

Q. That is in Bertie Kessler's? A. Yes, sir.

Q. And the figures? A. Yes, sir.

Q. I mean the list of stocks and bonds referred to. You knew about that transaction at the time you knew of that entry being made? A. I directed it to be made.

966 Q. What was done at the time that entry was made with those securities? A. Nothing was done with the securities.

Q. Where were the securities? A. Over in the vault.

Q. They were attached to or formed part of the envelope or were placed in an envelope, and that envelope was placed in the vault as before? A. It was there. I do not think the securities were attached at all.

Q. Were you present when these securities were removed? A. No, sir, I was not.

Q. Did you know of their being taken away? A. Not at the time.

Q. When did you know of it? A. I cannot say. 967

Q. With reference to the two items—400 ordinary shares Kessler & Company, Limited, and 200 preferred shares—were those securities placed in the envelope to which you have referred or attached to them? A. I do not know anything about what was done.

Q. You did not make these entries? A. No, sir.

Q. They were not made under your direction? A. No, sir.

Q. About the Kessler stock? A. No, sir.

Q. Do you know whether they were in the envelopes? A. I do not know.

Q. Did you ever see them with the envelopes— 968
the 400 shares of ordinary stock of Kessler and the 200 preferred? A. With these other securities, with the envelopes?

Q. Yes. A. No, sir, I never saw them there.

Q. On page 154 is an entry in your handwriting, "Special escrow, Kessler & Company, August 27, 1907," and a list of securities. Will you tell me what you did with reference to those securities at or about that time, if you did anything? A. Why, I put the notes in an envelope, and either went myself to the vaults and took the Orleans Quarry Company bonds referred to and put them in with it or requested Mr. Bertie Kessler to do so. I 969
am not positive in my recollection which, but I think I went personally first.

Q. How about the Cripple Creek common and preferred stock, under date of September 20th, 27th, and October 10? A. I think that I handed that to Mr. Bertie Kessler and requested him to put them in the bundle when he went over to the vault. It was not my habit to go to the vault to bring the box. Mr. Bertie Kessler did so, and that is the reason why I would ask him to do that rather than do it myself.

Q. Where were these promissory notes which you

970 say were taken and put in an envelope? Where were they? A. Before or afterwards?

Q. Before? A. In the portfolio of Kessler & Company, where we kept them in the office.

Q. Will you describe that portfolio? A. It was a leather-covered big bag.

Q. What was it used for? A. To hold drafts and notes in the hands of Kessler & Company, either as owners or as agents for others.

Q. And were these notes taken by you out of this portfolio? A. They were.

Q. By whose direction? A. Mr. Alfred Kessler.

971 Q. What did you do with them—promissory notes referred to in this list? A. My recollection is that I put them in a white envelope, with a list of what they were, and their due dates, and then put them in this larger envelope, which was with the bonds—went with the bonds.

Q. Were the bonds brought over to the office by anybody? A. No, sir.

Q. You ordered Bertie Kessler to take the bonds out of the safe deposit box and put them with the envelope? A. My recollection is that I did it myself.

972 Q. Where did you get those bonds from? A. They were locked in the vault—not brought over in the ordinary course of business.

Q. What vault? A. The North American Safe Deposit vault.

Q. Did it have any tin boxes in it—this vault? A. Yes, sir.

Q. Were these bonds, for instance, in the tin box, or were they lying on the shelf? A. On the shelf.

Q. Were they in an envelope or just loose? A. They were in a row, with a little memorandum as to what they were.

Q. And what did you do with them? Did you take them out of the room? A. Yes.

Q. Were there some bonds of the same kind

there? A. No—one there was and in the other 973
not.

Q. You took out the number here specified? A.
Yes, sir.

Q. Do you remember how many there were you
took out? A. Thirty-three.

Q. How many bonds were there altogether of
that same kind in the same row? A. I cannot
say; more than 100,000.

Q. Were there more than 33? A. Yes.

Q. Considerably more? What is your best recol-
lection? A. My best recollection is that there were
73.

Q. And you counted out the 33 bonds and placed 974
those with the envelope you corrected? A. I either
did it personally or requested Mr. Bertie Kessler
to do it.

Q. With reference to the Cripple Creek stock,
did you do that personally? A. I took the stock.
I did not put it in the escrow, no, sir, personally.

Q. What did you do about the stock? A. Gave
it to Bertie Kessler and asked him to put it in.

Q. Where did you get the stock? A. In a large
envelope in the box of Kessler & Company.

Q. In the vault? A. No, sir. It was brought
over every day. It was a large leather trunk.

Q. When this box was brought over on this par- 975
ticular occasion, you took out the Cripple Creek
stock and told Bertie Kessler to put it with the
Kessler & Company, Limited, escrow? A. The box
was brought over in the course of business, every
day, and sometimes during the day I took that
stock out and requested him to put it in the escrow.

Q. In this tin box what was kept? A. This box
that I am speaking of was a leather box.

Q. What was kept in it? A. Well, there was a
large amount of stocks and bonds—the kind of
a box which I have described as containing notes
and drafts and miscellaneous papers.

976 Q. Were any of these securities kept in that box at any time about which you have testified and to which these various entries which have been put in evidence refer, after they had been put aside, as you have testified? A. No, sir.

Q. Were those securities brought to the office every day? A. No, sir. You mean the Kessler & Company escrow?

Q. Yes. A. No, sir, they were not.

Q. When substitutions were made, did you go to the vault or send to the vault to have them made? A. I did.

Q. They were not then treated the same as the securities?
977

Mr. Larkin: I will have to object to that as leading, and it is a question of law, whether they were treated in the same way as the others.

Objection overruled.

Q. These securities that were called "Escrow, Kessler & Company, Limited"—were they or were they not treated differently than the securities which were placed in this leather box?

Mr. Larkin: I object to that question.

Objection overruled.

Q. As belonging to Kessler & Company?
978 (No answer.)

Q. Now, besides the leather box and the envelopes containing the securities of Kessler & Company, Limited, what other securities or papers or documents were in this vault? A. Well, there was a large amount in value of bonds and some stocks and miscellaneous papers of one kind and another.

Q. Where were they all placed? A. Some of them were in a tin box that was never taken from that vault, or scarcely ever; some of them lay on the shelf. There were two shelves in the vault besides the bottom part.

Q. A leather box, as I understand you, was brought over every day in the ordinary course of business? A. Yes, sir. 979

Q. Without anybody's instructions? A. Every day, excepting Saturday.

Q. Were the securities to which you have referred in your testimony and which are referred to on these pages of the loan book—were they brought over in that way? A. No, sir.

Q. Upon what occasion or by whose direction were they never brought to the office? A. I don't say they were never brought to the office.

Q. Were they brought to the office any more than that once? A. I think we had them brought over twice to check them up with that list. 980

Q. With the exception of those two times were they ever brought to the office? A. No.

Q. So any substitution or handling of them was done in the Safe Deposit Company? A. They were all done there.

Q. What was the transaction which you recorded here? (indicating). Tell the Referee the transactions of this is a record? A. It was a drawing of 20,000 Pounds by Kessler & Company of New York on Kessler & Company, Limited, of Manchester, at 60 days' sight, against which these securities were deposited as collateral or to be held there. 981

(By consent, the examination of Mr. Magie was suspended.)

EUGENE A. VANNEST, a witness called on behalf of Kessler & Company, Limited, being duly sworn, testified as follows:

By the Special Commissioner:

Q. What position do you hold, please? A. I am secretary and general manager of the Hanover Safe Deposit Company.

982 Q. You have produced these envelopes (indicating)? A. Yes, sir.

Q. From the safe deposit box? A. From the safe deposit box under rental of Kessler & Company.

Q. How many are there there—two? A. Yes, sir.

DIRECT-EXAMINATION BY MR. ELKUS:

Q. I show you two envelopes and ask you if you have produced those? A. Those are the two envelopes which were taken by the gentlemen who came to me and handed to me the order by Mr. Olney.

983 Q. What box were they taken from? A. From the box No. 365 rented to Kessler & Company, Limited.

Q. In what Company? A. Hanover Safe Deposit Company.

Q. In this City? A. New York City.

Q. Was there anything in the envelopes? A. There was.

Q. Did you notice what there was in it? A. I have no knowledge of the contents of those envelopes.

Q. Were there papers in the envelopes? A. There was something in the envelope. What it was, I do not know.

984 Q. Documents of some kind? A. I do not know.

Q. Was it paper or jewelry or gold or silver? A. There was something in the envelopes. I do not know what was in the envelopes.

By the Special Commissioner:

Q. Who took the envelopes from the box? A. The gentlemen who accompanied me.

Q. Which ones? A. Mr. Andrews and Mr. McLaughlin. Mr. Andrews represents Mr. Larkin.

By Mr. Elkus:

Q. Was it Mr. Henry Kessler? A. Mr. Henry Kessler removed the envelopes from the box.

Q. When was this done? A. This morning. 985

Q. Within a few minutes? A. Yes, sir

Q. Did you notice whether or not, besides something being in the envelopes, that the envelopes were fastened to any other bundles of papers? A. No.

By the Special Commissioner:

Q. You did not notice? A. My answer meant that they were not fastened, to the best of my knowledge and believe, to anything else.

By Mr. Elkus:

Q. Who was present? A. Mr. McLaughlin, Mr. Henry Kessler and Mr. Andrews, representing Mr. Larkin. 986

Mr. Elkus: I will have these marked for identification.

(The papers produced by the witness are marked for identification, respectively Kessler & Company, Limited, exhibits F and G for identification.)

WILLIAM E. MAGIE (Cross-examination resumed.)

By Mr. Elkus:

Q. Do you know whom it was to whom this \$20,000 draft was sold, if it was sold? A. I do not know at present. 987

Q. Do you know whether Kessler & Company of Manchester accepted that draft?

Mr. Larkin: I object to that. He cannot say whether—

By the Special Commissioner:

Q. You mean by that, of your own knowledge?
A. I do not know.

988 By Mr. Elkus:

Q. I show you this envelope which has been produced and marked Exhibit F for identification and ask you if the writing upon that is in your handwriting? A. No, sir.

Q. In whose handwriting is it? A. I think it is in Mr. Bertie Kessler's.

Q. And now that you see that envelope, can you say whether or not the envelopes about which I asked you with reference to the deposits of securities, referred to on page 129, were or were not destroyed? A. This envelope gives me no aid.

Q. That is the special escrow? A. Yes, sir.

989 Q. Now, did you ever see this envelope before?
A. I did not.

Q. Do you know whether or not this is the envelope in which was contained or in which you placed the promissory notes referred to on page 154? A. I think it is not.

Q. It is a different envelope? A. I think that was a different envelope.

Q. I show you the envelope, Exhibit G for identification, and ask you in whose handwriting that is? A. Mr. Bertie Kessler's.

Q. Was that the envelope in which were placed the securities referred to on page 159, under date
990 of October 22d, 1907?

Mr. Larkin: If you can state.

A. I cannot say, sir.

By the Special Commissioner:

Q. Whose handwriting is that? A. Mr. Bertie Kessler's.

Q. On Exhibit G likewise? A. Yes, sir.

By Mr. Elkus:

Q. Will you please state what explanation you want to make? A. That, on the date when that es-

crow was rewritten, I was very busy, and I requested Mr. Katt to rewrite it in the book, and it is quite probable that that is the envelope that Mr. Bertie Kessler made up at the same time; but I have no positive knowledge of the fact. 991

Q. Now, after looking at that envelope, can you tell whether or not the envelope attached to and containing some of the securities referred to on page 125 was or was not destroyed? A. I cannot.

Q. Will you kindly make a search, if you are at liberty to do so, and ascertain whether the envelope containing the securities, or attached to the securities referred to on page 129 has been destroyed? A. I can't say without search that it will not be found among the papers of Kessler & Company. 992

Q. Do you know any other place where it would be? A. No, sir. It was kept in the vault.

Q. And you say it is not among the papers of Kessler & Company? A. I am sure it is not among the papers that were in the office.

Q. Will you tell us what was on the envelope? A. I cannot tell what was on that envelope.

Q. Was it the same as on the envelope which you have just described? A. I have no positive recollection of the wording of the first part of it. I know it had a correct transcript of the list.

Q. Was it the same kind of envelope as Exhibit G? A. Yes. 993

Q. Was that an envelope you especially used—Kessler & Company of New York? A. Yes.

Q. The name on it—printed, "54 Wall Street," "Date," "Made," "Time," Interest," "Per Cent" and "Collateral"—all printed? Wasn't it the same kind of an envelope as they usually used? A. Yes.

Q. Was the word "loan" there? A. It was.

Q. Was the word "loan" there? A. It was. to your best recollection? A. Yes. I have no recollection about it. I have no positive recollection about those items. In the ordinary course of busi-

994 ness, I treated these and kindred matters—we would always strike it out and write the names in.

Q. Write what? A. My recollection is that I usually wrote "escrow."

Q. I notice the word "escrow" here. Was it written that same way up in the corner? A. No, sir.

Q. Written where? A. Over the word "loan;" the word "loan" scratched out.

Q. And what was written below that? A. "Kessler & Company, Manchester; might have put in "Limited" or not, according as I was in a hurry.

Q. Was the word "England" written also? A. I do not recall.

995 It was stated by Mr. McLaughlin, on behalf of Mr. Bertie Kesler, that Mr. Bertie Kessler who was to sail for England on next Tuesday, will remain here as long as he is wanted by the Receiver for the purpose of examination.

Mr. Elkus: I offer in evidence Exhibits F and G for identification.

Mr. Larkin: I object to their being received.

Objection sustained. Exception.

REDIRECT-EXAMINATION BY MR. LARKIN:

996 Q. Mr. Magie, at the various times you have been at that safe deposit vault did you ever notice any red ink there? A. Down in the safe deposit vault?

Q. Yes. A. Never looked for any.

Q. You never noticed any there? A. No; did not notice whether there was or was not any there.

Q. These envelopes, for instance, were written up in the office, I presume, were they not? A. I do not know where they were written.

Q. I am referring to Exhibits F and G for identification? A. Yes, I understand.

Q. You never saw them written—these envelopes—yourself? A. No, sir.

Q. And, as you stated a moment ago, these en-

velopes differed in the writing nothing from those 997
which you have referred to previously? A. From
my recollection of what we put on envelopes, they
may have been the same; I cannot say.

By Mr. Elkus:

Q. You are not positive they are the same? A.
I am not clear in my mind as to the exact wording
of the envelopes.

By Mr. Larkin:

Q. These envelopes—I am not speaking of these
special envelopes—but, when the list was made out
originally of the securities, they were made out, I 998
presume, over at the office? A. I do not know
where the first one was made out.

Q. And now, do you know who made it? A. Mr.
Bacon made it out.

Q. Subsequent to that, the other envelopes, as
they were worn out, from time to time, were made
up either by you or Bertie Kessler or somebody?

Mr. Elkus: I object to that as leading.

The Special Commissioner: Why don't you ask
him subsequent to that time by whom were the en-
velopes made up. There might be objection to the
other.

999

By Mr. Larkin:

Q. Well, by whom were the envelopes made up?
A. I think Mr. Bacon made the second envelope
after the same one was destroyed. I think that I
made the two following ones. I am not clear at
all about the last one that was made up, about
which I knew the writing of—whether I made it or
whether it was made under my direction by one of
the clerks.

Q. When the envelopes were made by you or un-

1000 der your direction, they were made over at the office, weren't they? A. Yes, sir.

Q. And they would be made up, wouldn't they, from the loan book in which you kept the record of the substitutions from time to time?

Mr. Elkus: I object to that as leading.

Q. Was your loan book made up from the envelope? What was the fact?

Mr. Elkus: I object to that as leading.

Objection overruled.

Q. What was your practice, Mr. Magie, in regard to making up the list of securities?

1001

Mr. Elkus: I object to that.

The Special Commissioner: You mean what was done in the case of the particular envelopes? That you may ask, but as to the practice in respect to the other envelopes, we do not care.

Mr. Elkus: I have no objection to his saying about these envelopes.

The Special Commissioner: You can say what was done in regard to this series of envelopes.

Q. What I want to get at is this: Whether the entries in your own book were made from the endorsements on the envelopes that you have spoken of, or whether the endorsements on these envelopes were made from the entries in the loan book?

1002

Mr. Elkus: I object to that as leading.

By the Special Commissioner:

Q. Not your practice as to other envelopes, but as regards these? A. As I have already testified the first envelope was made out, but it was entered on the loan book subsequently to that. The new envelopes made from time to time would be a copy of the loan book as it stood at the date the envelope was written.

Q. So that your substitutions, changes, would be made in your loan book from time to time—is that correct? 1003

Mr. Elkus: Objected to as leading.

Objection sustained. Exception.

Q. What did you do, Mr. Magie, when a substitution or change of securities was made? A. With reference to the books?

Q. Yes. A. They made the change in the loan book at the time.

Q. Was the change in your loan book made before the change was entered on the envelope? A. As a rule, yes, sir.

Q. When was the entry made, if at all, on the envelope? A. At the time the securities were taken from the vault and the new ones put in. 1004

Q. In any of these changes, did you act on your own initiative? A. No, sir.

Q. Under whose direction? A. Mr. Alfred Kessler's.

Q. Do you know whether Bertie Kessler made any of the changes or substitution of these securities? A. The physical change, you mean?

Q. Yes.

Mr. Elkus: I object to that.

By the Special Commissioner: 1005

Q. That is, yes or no. Do you know whether Bertie Kessler made any physical changes in those securities?

Mr. Elkus: I object to that unless the time is fixed and whether or not it was done by Mr. Magie's directions—whether he did it of his own initiative.

The Special Commissioner: He asks him whether he knows. He may answer.

The Witness: I know that he did at times make such changes at my request.

1006 Q. And this was because you had been requested by Mr. Alfred Kessler in the first instance? A. It was.

Q. Did you make any changes in those securities without instructions first had from Alfred Kessler? A. No, sir.

Q. Will you please describe the interior of this vault? A. It is a large vault, I think about so high (indicating about 4 feet) and so wide (indicating about 2 feet), and with two shelves, making two places——

By the Special Commissioner:

1007 Q. About how deep? A. Two and one-half feet.

Q. With shelves, two shelves? A. Two shelves, making three compartments.

By Mr. Elkus:

Q. Is this the one in the North American Safe Deposit Company? A. It is.

By Mr. Larkin:

1008 Q. Had you ever seen the securities in any other safe deposit vault than the North American Safe Deposit vault? A. I cannot recall the time of the changing from the State deposit vault to the North American. I think I have seen them in the State deposit, but I cannot recall certainly.

By Mr. Elkus:

Q. Where was the State? A. The State was under the old Bank of the State of New York, and after that bank was consolidated with the National Bank of North America, they abolished those vaults, or, at least, built them under different auspices.

By Mr. Larkin:

1009

Q. Can't you fix the time of the change of the old Safe Deposit vault and state it as being prior to 1903? A. I cannot fix it from memory. If I am asked to refer to the books of Kessler & Company, I think I can place it within six months.

Q. What books do you want to refer to? A. I think a very simple way would be to telephone the Safe Deposit Company of North America and find out when they started.

Q. Your recollection is that, as soon as the Safe Deposit Company of North America was started, this vault was obtained in it? A. Yes, sir.

Q. And the securities that you have referred to 1010 in your examination this morning were deposited in the State Deposit Company? A. Yes, sir.

Q. And they constantly remained in there, subject to the changes which appear in the books from that time down to the date of the assignment?

Mr. Elkus: I object to that as leading.

The Witness: The time that they were removed? I don't know when that was.

The Special Commissioner: I think you ought to avoid leading questions. You held the other side to pretty strict proof. I wish you would try not to lead him.

Q. I will change the form of the question, if I 1011 can. After the North American Safe Deposit Company established their vaults, what was done by Kessler & Company, so far as you know, regarding vaults in the building?

Mr. Elkus: I object to that as calling for a conclusion.

The Special Commissioner: Yes, I think it does—what he would do. He can state what he did or what was done in his presence

Q. Well, what did you do? A. Nothing.

Q. And did you see anybody do anything at that

1012 time? A. Mr. Bacon, who was the managing man at Kessler's, talked with me about the change of the vault, and where we should go. There was considerable discussion about the matter. It was finally decided to go to the North American Safe Deposit vault.

Q. Well, then, what happened? A. My recollection is Mr. Bacon and I went and transferred the securities from the State deposit vault to the North American Safe Deposit Company—from the State to the North American.

Q. And after that time, were any securities put in the old State Safe Deposit vaults? A. Not after
1013 the time we removed them that I have spoken of.

Q. So, from the time of the removal, the only vault that was used was this one that you have referred to? A. Since the time of the removal?

Q. Yes? A. It is not the only vault Kessler & Company had.

Q. Since the removal from the old State vault, the securities which you have been testifying about this morning have always remained in the North American Safe Deposit? A. With the exception of the time they were brought over to the office of which I have spoken.

Q. I am speaking now of the use which was
1014 made by Kessler & Company of the vaults for the holding of securities which you referred to this morning? A. Yes, sir.

Mr. Elkus: I object to that question as calling for a conclusion and using the word "holding."

Mr. Larkin: I withdraw the question.

Q. Now, will you please describe a little bit more fully the shelves in this North American Safe Deposit vault? A. There were two iron shelves that completely ran across the vault, length and width, making three compartments. Each compartment was a good size. The bottom one carried our leather trunk, which was quite a large box.

Q. Were these shelves that you have referred to 1015 divided into smaller compartments? A. No, sir.

Q. Was any part of the interior of the vault under lock and key? A. No, sir.

Q. Now, I think you stated on your direct-examination that the securities could not be contained in the envelope which you used—there were too many of them—the bonds were too many? A. That is true.

Q. And, in that case, a rubber band was used to fasten the envelopes and the bonds together? A. Making one bundle—a whole big bundle together.

Q. Did this vault contain any securities of Kessler & Company which were free or unpledged at 1016 that time? A. Yes, sir.

Mr. Elkus: I object to that. How does he know?

The Special Commissioner: Strike the answer out and we will hear what the question is.

(Question repeated.)

Mr. Elkus: I object to it as calling for his conclusion.

The Special Commissioner: What time do you refer to? Has that been fixed?

Mr. Larkin: At the time the Manchester securities were kept in this State safe deposit vault.

The Special Commissioner: I suppose you would 1017 have a right to show what other securities were on deposit there, and you might have a right to show that he knew of it—whether these particular securities were pledged. The objection is a pretty technical one. I am inclined to sustain it and give you an exception.

Q. What were the securities kept by Kessler & Company in the vault at any one time?

Mr. Elkus: What securities? To enumerate them, you mean—and no time being fixed?

1018 Mr. Larkin: I am speaking of the time from 1903, Mr. Referee, down to October, 1907.

The Special Commissioner: Well, begin at the first time you saw them there in the box.

The Witness: What securities were kept in that vault?

Q. Yes. A. I can tell you some of them. I cannot tell you all of them.

Q. Go ahead and mention the securities? A. There were several hundred of United Brewery bonds that belonged to various parties—some of them Kessler & Company's and some others.

Q. I am trying to get at what securities? A.
1019 There was the box, this leather trunk of which I have spoken, which contained at times over a million dollars' worth of securities belonging to some different individuals, some of them to firms.

Q. Now, was that the vault in which Kessler & Company kept the active securities which they were interested in? A. Yes, sir.

Q. Was that the vault in which—— A. You mean——

Q. I mean active securities—those which they had from day to day in their office? A. Both kinds were kept in that vault.

Q. Who had access to this safe deposit vault?

1020 A. While Mr. Bacon was with Kessler & Company, he did. I did and the firm, except I don't know whether Mr. Gillette had the combination or not.

Q. Did Bertie Kessler have access? A. He did.

Q. Did Mr. McLean? A. Yes, sir.

Q. And Mr. Nestly? A. No, sir, not to my knowledge.

Q. What was the practice in regard to going to the safe deposit vault?

Mr. Elkus: About the securities or about anything else?

Q. You say during this period from 1903 down 1021 to 1907, to October?

Mr. Elkus: I object to it as too indefinite and vague.

Mr. Larkin: If I put it in any other way, you will object to it as leading. I do not know how you can say the question is vague.

The Special Commissioner: I think he did testify that in this general leather box were contained the general securities of the firm and notes and other matters of this kind, and that was every day except Saturday taken from the vault to the office, then returned again, while the other securities, so far as he knew, only were brought two times in his recollection. Do you remember the testimony? 1022

Mr. Larkin: Yes.

The Special Commissioner: You have a right to cross-examine him about that.

Mr. Larkin: I want to ask him who had access to the vault—whether anybody could go alone or whether they had to go in pairs.

The Special Commissioner: He is not sure that Mr. Gillette had access, but Mr. Alfred Kessler, Bertie Kessler, McLean and he did, and Mr. Bacon.

Q. Any one of the people having access could go at any time to the vault, couldn't they? A. Yes, sir. 1023

Q. There is no requirement from the Safe Deposit Company that you should go in pairs? A. Not to my knowledge.

Q. And that was not the practice at the office, was it? A. No, sir.

Q. And, as a matter of fact, I think you stated that it was not your practice to go every morning to bring the box of securities to the counting room? A. It was not my practice, no, sir, excepting when these other gentlemen were away on their vacations.

Q. And who did that work? A. Mr. Bacon,

1024 while he was with the firm; afterwards Mr. Bertie Kessler.

Q. And did that continue right down to the closing of the doors of Kessler & Company? A. Yes, sir.

Q. You have stated, Mr. Magie, that certain securities called "Elkton shares" were kept at Colorado Springs. Do you remember that? A. Yes, sir.

Q. I think you stated that these securities were not received by Kessler & Company until October of this year? A. Yes, sir.

Q. Do you remember when they were received
1025 by Kessler & Company? A. I do not.

Q. Do you know whether they were received in the early part of October or in the latter part of October? A. In the latter part.

Q. Can you, by reference to any book of Kessler & Company, identify the date of the receipt of the securities? A. No, sir.

Q. Can you remember when the securities came whether they were accompanied by a letter or not from the brokers at Colorado Springs? A. I do not know. I did not receive the package.

Q. Who did receive them? A. I was informed that Mr. Bertie Kessler did.

1026 Q. Who so informed you? A. He did.

Q. Can you remember the date by any occurrence which took place on the date of the receipt of the securities? A. No, sir.

Q. Can you remember whether or not it was before or after the advent of Henry Kessler in the office?

Mr. Elkus: I object to that. I do not know what you mean by it.

The Special Commissioner: You mean the 21st of October, or his first visit?

Mr. Larkin: He could not remember the date. Is the question allowed?

The Special Commissioner: Yes.

1027

The Witness: It was after that date.

Q. How many days after his appearance in the office? A. I do not know.

Q. Do you remember the day that you were informed that Henry Kessler took the securities from the office? A. No, sir.

Q. Do you remember the day of the week it was? A. No, sir.

Q. Do you remember the day of the month? A. No.

Q. Was it before or after that date that the securities came? A. I do not remember.

Q. Did I understand you to say that you had no personal knowledge of the delivery of these securities to Henry Kessler? 1028

Mr. Elkus: I object to the use of the word "delivery." It implies something——

The Special Commissioner: Your objection is overruled.

Mr. Elkus: I object to it as calling for a conclusion, as testifying to something that he does not know to be a fact—as incompetent.

The Special Commissioner: I will allow the question as it is.

The Witness: I have no personal knowledge. 1029

Q. Did I understand you to testify in your direct-examination that you were informed of the fact? A. That is a fact. I do not recall what my exact testimony was.

Q. Now, were those securities received in the office before or after that?

Mr. Elkus: Which ones are you talking about—the Elkton securities?

Mr. Larkin: Yes, sir.

The Witness: You mean after the delivery or after I was told?

1030 Q. After you were told? A. I do not recall.

Q. Where was it that Albert Kessler told you that Mr. Henry Kessler had received the securities?

A. I do not recall.

Q. Was it not in the office? A. I think it was; yes, sir.

Q. Was it in the morning? A. I do not recall.

Q. When he spoke to you, did he say when it was that he received them? A. I have no recollection as to that. I was informed that Mr. Henry Kessler had the securities.

Q. Did Mr. Bertie Kessler, when he spoke to you about it, use the word "This day," or "To-day," or
1031 any words to that effect?

Mr. Elkus: I object to that as conversation which took place which is not binding on us in any way.

The Special Commissioner: I do not see how it is material. He says he did not participate in that transaction. We have already had some evidence as to what the transaction was and who was present. As I recollect, Mr. Alfred Kessler testified that Mr. Albert Kessler and Mr. Henry Kessler were there and superintended the transfer of these securities to Henry Kessler.

Mr. Larkin: It might have some bearing if we
1032 establish, say, when these Elkton securities were received, as to whether or not the record of the securities was properly kept, whether they did indicate the fact that the securities were on hand at a certain time.

The Special Commissioner: That is pretty far-fetched, remote. I do not think it is worth while to pursue that line of inquiry any further.

Mr. Larkin: Very well.

Q. You were in the office, Mr. Magie, during all the month of October? A. Yes, sir.

Q. Attending to business every day? A. Yes, sir.

Q. And were there during the business hours 1033 every day during that time? A. Excepting such times as I was out to lunch or on some business.

WILLIAM E. MAGIE resumes the stand.

REDIRECT-EXAMINATION (continued) :

Examined by Mr. Larkin :

Q. You were in the office, Mr. Magie, during all the month of October? A. Yes.

Q. Attending to business from day to day? A. Yes.

Q. And were you there during business hours 1034 every day during that time? A. Excepting such times as I was out to lunch or on some business.

Mr. Larkin: I would like to withdraw this witness for a moment and have Mr. Bertie Kessler sworn.

The Special Commissioner: Is there any objection to that?

Mr. McLaughlin: I think not.

ALBERT F. H. KESSLER, called and sworn as a witness, testified in behalf of the Receiver as follows:

DIRECT-EXAMINATION :

1035

EXAMINED BY MR. LARKIN :

The Special Commissioner: What is your full name?

The Witness: Albert Frederick Henry Kessler.

The Special Commissioner: And you reside where, where do you live?

The Witness: Staten Island, Huguenot Park, on Staten Island.

The Special Commissioner: Are you a married man?

1036 The Witness: Unmarried.

The Special Commissioner: Unmarried?

The Witness: Yes.

The Special Commissioner: You were formerly in the employ of Kessler & Company?

The Witness: Yes.

The Special Commissioner: In what capacity?

The Witness: As clerk and for the last two years as power of attorney.

The Special Commissioner: You were somewhat of a confidential man, were you, if you had a power of attorney?

The Witness: A certain amount of confidence.

1037 Mr. Elkus: Was your power of attorney in writing?

The Witness: In writing?

Mr. Elkus: Did you have a written power of attorney?

The Witness: Yes.

Q. Mr. Kessler, do you know Mr. Nestle, Mr. Otto G. Nestle? A. Yes.

Q. How long have you known him? A. About ten years.

Q. Where does he live?

Mr. Elkus: I object to this. It is neither relevant nor material to the case.

1038 The Special Commissioner: I suppose he wants to find Mr. Nestle.

Mr. Elkus: I have no objection to his finding or to his asking the witness about him, but I don't think our time should be taken up——

The Special Commissioner: I will allow the question and give you an exception.

Mr. Elkus: Exception.

Q. Where does he live? A. On Staten Island.

Q. Do you live on Staten Island? A. Yes.

Q. Do you live in the same house? A. No.

Q. When did you last see Mr. Nestle?

Mr. Elkus: I object to this and also to all this ¹⁰³⁹ testimony on the ground it is irrelevant, incompetent and immaterial, has nothing to do with the issues in the case, and is a waste of time.

The Special Commissioner: The same ruling.

Mr. Elkus: Exception.

The Special Commissioner: Where does Mr. Nestle live on Staten Island is the last question. I think the witness is a little deaf.

Mr. Elkus: No, I think not.

Q. Where did you last see Mr. Nestle? A. Yesterday about ten o'clock.

Q. Where? A. In the office of the Receiver.

Q. Did Mr. Nestle say anything to you as to ¹⁰⁴⁰ whether he was to go off anywhere?

Mr. Elkus: I object to that. This cannot be binding upon us in any way.

The Special Commissioner: The same ruling.

Mr. Elkus: It is irrelevant, incompetent and immaterial.

The Special Commissioner: The same ruling.

Mr. Elkus: Exception.

The Witness: He said he was going to Frankfort; indirectly to Frankfort, he might stop off in Paris?

Q. What? A. Paris, he might stop off in Paris. ¹⁰⁴¹

Q. But when did he say he was going?

Mr. Elkus: The same objection.

The Special Commissioner: The same ruling.

Mr. Elkus: Exception.

The Witness: He said he was going on Tuesday.

Q. Of next week? A. Of next week.

Q. On what steamer? A. Kron Princessen Cecilia.

Q. Were you going with him? A. I was going with him.

1042 Q. How long have you been making preparations to go? A. Have I?

Q. How long have you and he been making preparations to go? A. He has made preparations for some time. I made them on the night before—on Friday night.

Q. Did you tell anybody you were going abroad on Tuesday following?

Mr. Elkus: Now, Mr. Referee, I must insist upon——

The Special Commissioner: There must be some limit to this.

Mr. Larkin: Yes, I know.

1043 Q. Do you know where Mr. Nestle is now? A. No.

The Special Commissioner: He says he knows the house on Staten Island where he lives, but he doesn't know the street—didn't you say that?

The Witness: I don't know the address, the verbal address of where he lives.

The Special Commissioner: You know the house?

The Witness: Yes, I know the house in St. George, Staten Island.

The Special Commissioner: St. George, Staten Island?

1044 The Witness: Yes.

The Special Commissioner: Now, give us as near a description of it as you can.

The Witness: Mr. Burroughs is the name and it is on Third Avenue.

The Special Commissioner: How far from the landing?

The Witness: About a mile.

The Special Commissioner: How do you go, on the trolley or how?

The Witness: You can go by trolley; almost every trolley takes you fairly by the house.

The Special Commissioner: You don't go by 1045 Rapid Transit?

The Witness: No.

The Special Commissioner: You say on Third Avenue at Mrs. Burroughs and she is a boarding house keeper?

The Witness: Yes.

The Special Commissioner: He is not married?

The Witness: No.

The Special Commissioner: How old a man is he?

The Witness: 36 I think.

The Special Commissioner: What is his position in the firm?

The Witness: Confidential clerk to Mr. Flinsch.

1046

Q. Have you had any communications with Mr. Nestle to-day or yesterday after ten o'clock?

Mr. Elkus: The same objection.

The Special Commissioner: Objection overruled.

Mr. Elkus: Exception.

The Witness: I had telephone communication with him yesterday.

Q. What time yesterday? A. About three o'clock.

Q. Did he state to you where he was to be the next day or two? A. No.

1047

Mr. Elkus: I object to that.

The Special Commissioner: He says no. The same ruling.

Mr. Elkus: Exception.

D. Did he give you any address where you could reach him? A. No.

The Special Commissioner: You know, the object of counsel is he wants to call Mr. Nestle for some purpose or other. Now, can you give the Court or counsel any information as to the where-

1048 abouts of Mr. Nestle so that he can be notified to attend this hearing?

The Witness: No, I cannot.

Q. Is he a member of any club in this City that you know of? A. Is he?

Q. Yes? A. The German Club.

Q. Where is the German Club?

Mr. Elkus: 59th Street.

The Special Commissioner: What is the answer? Do you know where the club is?

The Witness: 59th Street, opposite the Park, I think, between Sixth and Seventh Avenues.

1049 Q. Is he a member of any other club or organization? A. He is a member of the Richmond Country Club on Staten Island.

Q. Do you know whether he makes a practice or habit of staying at the German Club in the City?

Mr. Elkus: I object. We have gone far enough.

The Special Commissioner: I will allow it. Do you know?

The Witness: I don't know. I really don't know at all.

Q. If you wanted to reach Mr. Nestle now, today, you wouldn't know where to communicate with him? A. No.

1050 Q. Or where to go? A. No.

Mr. Larkin: I wish the Referee would instruct the witness that he is under subpoena and must not leave the jurisdiction of the Court.

The Special Commissioner: You understand that?

The Witness: Yes.

CROSS-EXAMINATION :

EXAMINED BY MR. ELKUS:

Q. Mr. Kessler, you told somebody you wanted to sail for Europe, didn't you? A. As a personal

matter I wanted to go over and see my relatives, ¹⁰⁵¹ but I didn't want to go if it was necessary to stay over here.

Q. Who are your relatives, your father and your mother? A. No, I wanted to see my sister.

Q. Did you see Mr. McLaughlin about going to Europe, and did he tell you to remain here? A. Yes, and I told him if it was necessary to be examined I would.

Q. And you cancelled your passage? A. I didn't take out any passage.

Q. You hadn't taken out any passage? A. No.

Q. Before you took your passage you inquired whether you would be required here as a witness? ¹⁰⁵²

A. Yes.

Q. And as soon as you took your passage—

Mr. Larkin: He said he didn't take any passage—

Q. Or attempted to take any passage— A. I would have asked, as I did ask.

The Special Commissioner: Well, they want to examine you, probably, next week and counsel requests me to tell you you are under subpoena and had better remain here.

The Witness: Yes.

The Special Commissioner: That is all now, ¹⁰⁵³ Mr. Kessler.

Mr. McLaughlin: Are you going to call Mr. Bertie Kessler any more to-day?

Mr. Larkin: No, I don't think so.

Mr. McLaughlin: He wants to go.

Mr. Larkin: I will not need him any more.

The Special Commissioner: Will you take all day to finish the examination of Mr. Magie?

Mr. Larkin: I don't know, Your Honor.

The Special Commissioner: I want to use up an hour and a half. What other witness have you besides Mr. Alfred Kessler?

- 1054 Mr. Larkin: I was going to call Mr. Flinsch.
Mr. Elkus: Is he here?
Mr. Larkin: No, I don't see him here. I don't know whether he is in town or not.
Mr. Seymour: I think he is in the country.
The Special Commissioner: You have no one here except Mr. Kessler? If we are going to try this case and get through with it we cannot stand on the order of witnesses. If you have anything to ask Mr. Kessler I think you had better call him as soon as possible. You had better stay if you have no other engagement.
Mr. Kessler: I have no other engagement.
- 1055 Mr. Larkin: Mr. Magie, will you take the stand.

WILLIAM E. MAGIE resumes the stand.

REDIRECT-EXAMINATION (Continued):

EXAMINED BY MR. LARKIN:

Q. Mr. Magie, will you please tell me in whose handwriting the list of securities on page 159 is in? A. The main entries there are in the handwriting of Alfred Katt and the last two entries in Bertie Kessler's.

- 1056 Q. Do you know in whose handwriting the figures opposite that list of securities are in? A. I think those are Mr. Alfred Kessler's.

Q. It is also Mr. Katt's handwriting in the entries on page 129 above "September 29th," and from there on in your handwriting? A. All except these changes here.

Mr. Elkus: All except these two lines?

The Witness: All except the changes.

The Special Commissioner: The changes are in your handwriting?

The Witness: The changes are, yes; and the original entries are in Mr. Katt's handwriting.

The Special Commissioner: That is the page 1057 which you testified Mr. Katt made under your direction? A.

The Witness: Yes, that is one of the instances, twice he did them.

The Special Commissioner: Is his name Katz?

Mr. Elkus: Katt.

The Witness: K-a-t-t.

Q. Will you look at page 45, Mr. Magie, and see whether the Elkton shares are referred to on that page? A. They are at the bottom.

The Special Commissioner: Are the Elkton shares now among the securities?

Mr. Larkin: Those are shares, from the testimony of the witness, which were received in the latter part of October. 1058

The Special Commissioner: They are now in the safety deposit among what they call the escrow securities.

Mr. Elkus: So I am informed.

Q. Will you look at page 37 and see if those shares appear on that page? A. No, they do not; they do not appear on that page.

Q. So that they first appear on page 45? A. At the bottom of the page.

Q. At the bottom of the page? A. Yes.

Q. And that page bears the date of November 2nd, 1904? A. I don't think that refers to the date when the entry of the Elkton was made. 1059

Q. Can you identify the date of the Elkton entry? A. It was November 2nd, or afterwards; probably afterwards, though I can't say for certain.

Q. How long afterwards, you don't know? A. I can't say.

Q. It is a fact, it is not, these Elkton securities remained in Colorado Springs from the time they were first purchased, which was about November,

- 1060 1904, down to the latter part of October, 1907?
A. I don't think that date is 1904, and that don't follow, that is when they were purchased. They did remain, as a matter of fact, in Colorado from the time they were purchased until 1907. But I don't think the way you have the question represents the fact.

The Special Commissioner: That is all you want, isn't it? They remained there down until sometime in October, 1907, did you say?

The Witness: Yes.

Mr. Elkus: Paid for?

- 1061 The Witness: They were paid for when bought and left with the brokers in Colorado Springs; and they were bought long before they were put in the escrow.

The Special Commissioner: You say they were bought——

Mr. Elkus: Long before they were put in escrow.

The Special Commissioner: Not before the escrow was created?

The Witness: I didn't say that.

Q. I suppose the books of the concern will show when they were purchased, will they not? A. Yes.

- 1062 Q. Under what account would that Elkton transaction be, can you state? A. You mean where they were purchased?

Q. No. A. Who they were bought of?

Q. No. If I wanted to find the Elkton transaction in the books what account would I have to look for? A. I think they were put on the stock account; the easiest way to find out would be to look in that book I have spoken of several times as the stock book.

Mr. Elkus: Is that a book of original entry?

The Witness: It is an original entry of its kind. It is not for dollars and cents.

The Special Commissioner: When you purchased stocks they were put in that book? 1063

The Witness: Yes.

The Special Commissioner: When you sold stock, likewise?

Mr. Elkus: Crossed off the book when they were sold.

Q. Mr. Magie, who had charge of the cables, dispatching cables? A. If I name any one person I should say Mr. McLean.

Q. Mr. McLean? A. Yes.

Mr. Elkus: Were there more than one?

The Witness: Any member of the firm might send a cable off without speaking to Mr. McLean, or some other person might arrange it without consultation with him, but the regular business of cabling abroad was in Mr. McLean's hands. 1064

Q. Who cabled abroad to Kessler of Manchester? A. I don't know.

Q. Do you know whether any cables were sent to Kessler of Manchester during the week of October 21st? A. I do not.

Q. Do you know whether Mr. Bertie Kessler had anything to do with writing out cables before they were sent? A. Some cables he had, others he did not.

Q. The cables sent to Manchester were sent in code, were they not? A. I think all our cables to regular correspondents were sent in code. 1065

Q. That answer applies then to the Manchester house? A. As far as my knowledge goes. I would like to add, if I may, that I saw very few of those cables, if any, very few of them. I only know the custom.

Q. Did I understand you to say that the transactions with Manchester were had by Albert Kessler and Bertie Kessler generally?

1066 Mr. Elkus: I object to that. How does he know?
Mr. Larkin: I am asking him.

Mr. Elkus: Let me have a ruling on it. I object as leading and it assumes a fact that has not been proven.

The Special Commissioner: Ask him what he knows about it.

Q. What do you know about the communication by cable between the New York house and the Manchester house?

1067 The Special Commissioner: He said Mr. McLean had charge of it and any partners could send cables when they chose to and did so, personally, he saw very few cables; and he said that also applied, as far as he knew, between Kessler & Company in New York and Kessler & Company, Limited.

Q. Is that correct, Mr. Magie, as the Referee stated it? A. Yes.

Q. What was the practice, do you know, in regard to keeping copies of cables?

Mr. Elkus: I object to that. The witness does not know anything about it.

The Special Commissioner: You mean copies of cables that were sent.

Mr. Larkin: Sent.

1068 The Special Commissioner: Objection overruled.
Mr. Elkus: Exception.

The Witness: Almost all our cables sent abroad were in code. They were given to a clerk to make the translation, and the original cables and translations were copied in the cable-book, press copied in the cable-book.

Q. Is that cable-book in existence now? A. I don't know.

Q. When did you see it last? A. I don't recall. It was a book I had very little occasion to refer to.

Q. Was it bound together, or was it a book consisting of loose leaves? A. I think of late years all our press copy work, with possibly one exception, was done on loose sheets on a roller that was afterwards cut apart. 1069

Q. What did you mean by saying just now that some clerk would make a translation of the cable, will you please explain that?

Mr. Elkus: Isn't that self-explanatory?

The Witness: The cable was made up in code, and then the cable was handed to some junior clerk in the office with instructions to make a translation of it to be submitted to the person writing the cable to see whether it was correct, it was checked to see whether it would be understood on the other side, and the cable was usually sent in a letter that was written confirming the cable. That is, the translation, not the copy. 1070

Q. Sent in a letter following? A. Yes, usually. I won't say it was always done.

Q. Now, did I understand you to say that cables were constantly passing between New York and Manchester?

Mr. Elkus: I object. He says he doesn't know.

The Special Commissioner: You asked him if he said so? 1071

Mr. Larkin: Yes.

Mr. Elkus: If he said it it is a fact, what is the difference?

The Special Commissioner: I don't think he said so.

Mr. Larkin: I don't know.

The Special Commissioner: It is the fact you want.

Mr. Larkin: Yes.

The Special Commissioner: Objection overruled.

Mr. Elkus: Exception.

1072 Q. Isn't it a fact that cables were passing between New York and Manchester constantly? A. It depends upon what you mean by "constantly."

Q. What do you mean by "constantly"? A. I should understand every day by that.

Q. Was that the fact? A. No, I think not. I haven't enough knowledge about the cables to say positively, but I think not.

Q. Do you remember, Mr. Magie, the week of October 21st? A. In a general way.

Q. Do you remember that on October 22nd, the Knickerbocker Trust Company closed? A. No, I could not remember it.

1073 Mr. Elkus: I object.

The Special Commissioner: He says he cannot remember it.

Q. Do you remember that the Knickerbocker Trust Company did close?

Mr. Elkus: I object as irrelevant, incompetent and immaterial. It has nothing to do with the case.

The Special Commissioner: I will allow it.

Mr. Elkus: Exception.

The Witness: I remember the papers reported the failure of the Knickerbocker Trust Company.

1074 Q. Do you remember whether Mr. Henry Kessler was present in the office on the day the Knickerbocker Trust Company failed? A. I do not.

Q. Do you remember any day during the week of October 21st, when Mr. Henry Kessler was present? A. I could not specify any particular day.

Q. Did you have any conversation with him while he was present in the office? A. I spoke to him several times. I don't know whether you would call it a conversation or not.

Q. How long was he there at the office?

Mr. Elkus: Do you mean any particular time or 1075 generally?

The Witness: Different lengths of time on different days.

Q. Do you remember any day when Mr. Henry Kessler was at the office? A. Not to name any specific day, no.

Q. Can you remember when he was present at the office by any incident which happened at the time? A. No, not as to any day or definite time.

Q. Can you remember when he was in the office by any incident which occurred at the time which impressed it on your memory? A. Not as to any particular incident. 1076

Q. Did you have any talk with him at any time with reference to the securities mentioned on the loan book? A. Not that I recollect, none that I recollect.

Q. In the week beginning October 21st? A. I have no recollection of any such conversation.

Q. Did you see Mr. Henry Kessler talking to anybody in the office while he was there? A. Yes.

Q. With whom did you see him talking? A. I have seen him talking with Bertie Kessler and Alfred Kessler and I think Mr. McLean, and, possibly, some others.

Q. Did you see him talking with Mr. Nestle? A. 1077 I have very likely. I don't recall certainly.

Q. Are you able to state how many days, or how long it was from day to day, that he was at the office? A. No.

Q. Do you remember the occasion of the general assignment, when it was made? A. Yes.

Q. Was he in the office on that day? A. I don't recollect. I think he was, but I am not sure.

The Special Commissioner: What date was that?

Mr. Elkus: October 30th.

Mr. Larkin: October 30th.

1078 The Witness: That date I am sure of.

Q. Do you know whether he sent any cables to Manchester from the New York office? A. I do not.

Q. At any time while he was there? A. I do not.

Q. Do you know whether he gave any instructions to anyone to send any cables to Manchester while he was there? A. I do not.

Q. What conversation did you have with him? A. None of any length, and, as far as my memory goes now, none that related to business.

Q. And nothing which related to financial affairs generally at that time? A. I have no recollection, but I may have said, in the course of conversation, that things looked pretty blue, or things were not improving or something to that effect, but I have no recollection of any business conversation I had.

1079

Mr. Elkus: I move to strike out what he may have said.

Q. When you say you may have said it you are giving your best recollection of the subject matter of your conversation? A. I am giving no recollection. I am merely saying what probably occurred in conversation between two men in a banker's office on that day.

1080

Q. Do you remember on that day there was a run on the Trust Company of America and you could see the run right out of your window?

Mr. Elkus: I object as irrelevant, incompetent and immaterial.

The Special Commissioner: I will allow it.

Mr. Elkus: Exception.

The Witness: Read the question.

(Question read as follows:)

Q. Do you remember on that day there was a run on the Trust Company of America and you

could see the run right out of your window?" A. 1081
I remember there was a run on the Trust Company of America and by looking out of our window we could see the tail end of the line.

Q. Do you know whether Mr. Kessler saw the run? A. I do not.

Mr. Elkus: I object.

The Special Commissioner: If he knows he can answer. Did you examine Mr. Kessler at any great length about this?

Mr. Larkin: Mr. Albert Kessler.

Mr. Elkus: I made a motion to strike out what he may have said.

The Special Commissioner: Read that so that 1082
we can strike out what he wants stricken out.

(Question and answer read as follows:)

"Q. What conversation did you have with him
A. None of any length, and, as far as my memory goes now, none that related to business."

"Q. And nothing which related to financial affairs generally at that time? A. I have no recollection, but I may have said, in the course of conversation, that thing looked pretty blue or things were not improving, or something to that effect, but I have no recollection of any business conversation I had."

1083

Mr. Elkus: I move to strike out what he may have said.

The Special Commissioner: Strike out from the beginning down to "improving." If you wish you may have an explanation. If you do not, you need not.

Mr. Larkin: Well, as long as I can have it, I believe I will take it.

Q. So that, Mr. Magie, your testimony is, although you may have had several talks with Mr. Henry Kessler, you don't know what you talked

1084 about? A. I have no recollection of what I talked about any more than simply to say "Good morning," how he was feeling, or something to that effect.

Q. Mr. Magie, who had charge of the ledgers?

A. Mr. Brettschneid was our bookkeeper.

Q. Is he now still with the Receiver? A. No, he took another position, he left to take another position about a week ago.

Q. Do you know where Mr. Otto Nestle is now?

A. No.

Mr. Elkus: You asked him that.

Mr. Larkin: Asked who?

1085 Mr. Elkus: You asked him before recess.

Q. Mr. Magie, do you know when these entries at the bottom of page 129 regarding the Kessler & Company shares, ordinary and preferred, were made? A. I don't know, but I know it was in the latter part of the month of October, 1907.

Q. The top of the page is August 24th, 1906, isn't it? A. If you say so.

Q. Just look at it, please?

Mr. Elkus: Conceded.

Q. (Showing witness page 129.) A. Yes, that is right.

1086 Q. You say those two entries were made in October, the latter part of October?

Mr. Elkus: Do you know anything about them?

Mr. Larkin: Wait a minute.

Q. Did you see them made?

Mr. Larkin: Is that the right way to do, to interrupt the cross-examination.

The Special Commissioner: We all exercise the privilege of interrupting.

Mr. Elkus: Does he know anything about it?

Mr. Larkin: The witness has testified they were in the handwriting of Mr. Bertie Kessler, if I un-

derstand it, and I am now asking him—the stenog- 1087
rapher will please read my question and read the
answer the witness started to make.

The Special Commissioner: He was asked if he
knew when they were made and he said he did,
they may have been made in his presence.

Mr. Elkus: If he does know, all right.

The Witness: I beg your pardon. I don't think
I have ever said I knew when they were made.

The Special Commissioner: It is on the record.

The Witness: I simply said the latter part of Oc-
tober.

The Special Commissioner: That means the
month. 1088

The Witness: I know they were in there then. I
know they were not there the first part of the
month when I looked at the book; but when they
were put on I don't know.

The Special Commissioner: I suppose that an-
swers the question?

Q. You find, do you not, Mr. Magie, similar en-
tries with similar lines drawn through them at the
bottom of page 159? A. Yes, I do.

Q. And those entries were made at the time you
just now stated with reference to page 129, in the
latter part of October, 1907?

Mr. Elkus: That is leading. Ask him when they 1089
were made, if he knows.

The Witness: I don't know when they were made.
I know that is dated October 22nd, and I take that
to be the correct date, as the writing that was made
on October 22nd has the final entries in different
handwriting on the page.

Q. Where is Mr. Katt, Mr. Magie, do you know?

A. I don't know. I have only seen him once since
the assignment. He lives in Union Hill, New Jer-
sey.

1090 Q. Is he employed in this City? A. I beg pardon.

Q. Is he employed in this City? A. Not to my knowledge.

Q. Do you know, Mr. Magie, who sent for the Elkton stocks?

Mr. Elkus: I object to that as a question implying that somebody sent for them. They may have been sent on by the concern itself.

The Special Commissioner: He asked if anybody, if he knows.

The Witness: Am I to answer the question?

The Special Commissioner: Yes.

1091 Mr. Elkus: Exception.

The Witness: Yes, I know who sent for them.

Q. Who sent for them? A. Mr. Alfred Kessler had the letter written signed Kessler & Company.

Q. What letter-book would that letter be in? A. It would be in the regular letter file.

Q. Well, has it any name? A. There isn't any book. Our present system of copying letters is we have a lot of boxes there that have alphabetical lists on them.

The Special Commissioner: You keep carbon copies of letters?

1092 The Witness: No, it is equivalent to carbon copies. We have a long roller, the letters are rolled through and those are cut off every day, each separate letter, and those filed away just as a carbon copy might be.

Q. And indexed under the initial of the name of the person to whom the letter was sent? A. Unless we had a special box for the party.

Q. In this case you would not have a special box? A. I think not.

The Special Commissioner: Do you know when?

The Witness: I don't recall the date.

Mr. Elkus: Did you write the letter?

The Witness: I rather think I dictated that let- 1093
ter myself. I didn't sign it, but I think I dictated
it.

The Special Commissioner: You dictated it?

The Witness: I think so. That is my recollec-
tion.

Q. Mr. Magie, will you please look at page 159?

A. Yes.

Q. You find on there, do you not, 1341 shares of
Daimler Manufacturing Company, Preferred? A.
Yes.

Q. The page from which those entries were car-
ried is 129, isn't it? A. Yes.

Q. You notice on page 129 that the securities re- 1094
ferred to are a certain number of shares of Daimler
Common, were they not? A. Yes.

Q. And the Daimler Common was not sold? A.
No.

Q. The Daimler Common was taken out of this
escrow and Daimler Preferred substituted, was it
not? A. Yes.

Q. On or about the day this bears date? A. I
don't recall the exact date. About that time.

The Special Commissioner: What was the date?

The Witness: The date is October 22nd.

The Special Commissioner: 1907?

The Witness: 1907, yes. 1095

Q. And the substitution was made on that date,
or some day or so afterwards?

Mr. Elkus: I object to that. That is leading.
Ask him when the substitution was made.

The Special Commissioner: Yes. When was the
substitution made?

The Witness: I don't recall for certain, but not
far from that time, either a little before that or at
that time.

Q. Do you know when the Manchester House
was advised of that transfer? A. I do not.

1096 Mr. Elkus: I object unless in writing and that speaks for itself.

Q. They were advised of the transfer on the 25th of October, 1907? A. I beg pardon?

Q. They were advised of the transfer on the 25th of October, 1907?

Mr. Elkus: Is that testimony?

Mr. Larkin: If you will read the testimony, you will see it.

Mr. Elkus: All right; then, why ask the witness about it?

Q. Do you remember that? A. I don't remember
1097 when they were advised.

Mr. Larkin: That is all I want to ask the witness.

Mr. Elkus: Just a question or two.

RECROSS-EXAMINATION.

Examined by Mr. Elkus:

Q. Mr. Magie, the figures in ink, after the description of the securities on page 159, were written by Mr. Kessler, were they not? A. Yes, Mr. Alfred Kessler.

Q. There are some figures in pencil at the bottom
1098 of the calculation opposite those entries with reference to Kessler and Company's stock which was stricken out; did they refer to the Kessler and Company stock, or are they an addition of the previous figures? A. An addition of the previous figures.

The Special Commissioner: Didn't Mr. Kessler testify they were not his figures?

Mr. Elkus: I think he did.

Q. There is no valuation placed opposite Kessler and Company's stock? A. No.

Q. Either in pencil or otherwise? A. No. The

figures 51,307,41, I assume, from the amount and ¹⁰⁹⁹ the location of the figures, it is the footing of the column.

The Special Commissioner: You don't know in whose handwriting it is?

The Witness: It looks like Mr. Alfred Kessler's.

The Special Commissioner: It looks like Mr. Alfred Kesler's?

The Witness: Yes.

The Special Commissioner: I think he said that was a pencil addition he made himself.

Q. Did you have a safe in the office of Kessler & Company? A. There were two safes besides the 1100 vault.

Q. Did you keep the securities there? A. Very rarely.

Q. During the day were the securities put there? A. No.

Q. Where were they kept during the day? A. The Cashier's Department was all railed in and on the outside of that Department there were wire boxes that stood up on legs so as to be of even height and the securities that came to the office were either left in a leather trunk or put in those boxes.

Q. What was the safe used for, books? A. Some ¹¹⁰¹ books and other papers, insurance policies.

Q. Did you have any other vault? A. One in the North American Safety Deposit Company and we had one regular vault in the National Safety Deposit Company and one special vault. If you want an explanation I can give it. It really didn't belong to Kessler & Company's business at all.

Q. National Safety Deposit? A. We had one vault there we used regularly. In addition to that there was a box that stood in Kessler & Company's name, but was never used for any purpose except for securities held in escrow.

- 1102 Q. You mean under those escrow accounts.
Mr. Larkin: I object to that.
The Witness: Yes:
Mr. Elkus: I am asking him a question.
The Special Commissioner: Objection sustained.
Mr. Elkus: Exception.
Q. What was this safety deposit box used for?
Mr. Larkin: Which one?
Mr. Elkus: The extra one in the National Safety Deposit Company.
The Witness: There was one Trust Company—
Mr. Larkin: Now, wait a minute. I object to the
1103 question, as the testimony is offered for the purpose of proving some transaction with other people. If that is the object of it, I object to it.
The Special Commissioner: I understand that is the object.
Mr. Elkus: Yes.
The Special Commissioner: I sustain the objection.
Mr. Elkus: Exception.
The Witness: I would like to make this claim if I may be permitted to do so. It don't refer to Kessler & Company's business in any way.
The Special Commissioner: Then, it is of no use anyway.
1104 Mr. Larkin: I am satisfied with the explanation.
The Special Commissioner: Then, I will strike out all that was voluntary.
Mr. Elkus: That's all.
The Special Commissioner: Who is your witness?
Mr. Larkin: I will call Mr. Henry Kessler.

HENRY KESSLER, called and sworn as a witness, testified, in behalf of the Receiver, as follows:

DIRECT-EXAMINATION.

Examined by Mr. Larkin:

Q. Mr. Kessler, where do you live? A. In Manchester, England; or do you wish my address here?

Q. What is your business? A. I am a merchant 1105
in dry-goods.

Q. You say you are a merchant dealing in dry-goods? A. Yes.

Q. You have a separate establishment? A. No, I am one of the Directors of the Company of Kessler & Company, Limited, of Manchester.

Q. That is what you meant by saying you were a merchant? A. Yes. You asked me what I was and I said I was a merchant in Manchester.

The Special Commissioner: What is the business of Kessler & Company, Limited?

The Witness: Dealers in dry goods.

The Special Commissioner: That is Kessler & 1106
Company, Limited?

The Witness: Yes.

Q. You are a member of that firm?

Mr. Elkus: He is a Director.

The Witness: I am a Director.

The Special Commissioner: The Managing Director?

Mr. Sprague: Chairman of the Board.

The Witness: I am Chairman of the Board and a Director. You call it Managing Director; we call it Director.

The Special Commissioner: What do you call it? 1107

The Witness: We only call ourselves Directors.

The Special Commissioner: And Chairman?

The Witness: Yes, and Chairman of the Company.

The Special Commissioner: You are the managing officer?

The Witness: I am one of the managing officers.

Mr. Elkus: One of them?

The Witness: Yes.

The Special Commissioner: Are you not the Chief Managing Officer?

1108 The Witness: I am Chairman, whatever you call it, the Chief Managing Officer.

Q. Mr. Kessler, how old are you? A. I am in my sixty-eighth year. I am sixty-seven now, this year, in August.

Q. How long have you been engaged in business? A. Since 1856.

Q. And what has been the nature of your business since 1856? A. Well, I was first an apprentice in our Frankfort house, and then I came over in 1861—it may have been 1860—to Manchester, but I believe it was 1861, and have been in Manchester since, and I went through all the different departments; I travelled for the firm all over the Continent, and in 1868 I went to the West Indies, travelling to Mexico, went to Cuba, went by way of Panama to Chili, came back by way of Panama again, and went to Venezuela, and then went to the West Indies again, Cuba, and then went through the Southern States, and afterwards I travelled through Norway and Sweden.

Q. What was the business of your Frankfort house? A. Our Frankfort house, they were wholesale dealers in dry goods.

Q. And subsequently became bankers? A. Yes, subsequently became bankers; we gave the dry
1110 goods business up.

Q. Then, you have been, as I understand, actively engaged in business since 1856 or 1858? A. Yes.

Q. Somewhere along there? A. Yes.

Q. And you have been constantly connected with the Manchester house since 1861, or thereabouts? A. Yes.

Q. When you went over to Manchester? A. Yes.

Q. Now, prior to the incorporation of your present company, I presume the Manchester house was a partnership, was it not? A. Yes.

Q. And the head of the Manchester house was William Kessler? A. Yes, at that time. 1111

Q. And William Kessler, prior to his death, was also the head of the New York house, was he not? A. Yes.

Q. After his death the present company was incorporated? A. Yes.

Q. Some time after? A. Yes.

The Special Commissioner: About when was that?

Q. Are you able to fix the date when your present company was incorporated? A. I believe it was in 1862.

1112

Mr. Elkus: 1862?

The Witness: I believe it was in 1862.

Q. 1862? A. Yes.

Q. Oh, no.

Mr. Elkus: He does not mean that. He means the partnership.

The Witness: No, no; I don't mean that. In 1902, I mean.

Q. 1902? A. I believe it was 1902. I am not quite certain about that.

Q. Now, your company was organized, was it not, not only to do a manufacturing and trading business, but also a banking business? A. No, it was not. 1113

Mr. Elkus: I think the certificate of the incorporation of the company is the best evidence of that.

The Special Commissioner: You have got your answer. He says no.

The Witness: Our principal business was the dry goods business.

Q. No; I didn't ask you what your principal business was. A. What is that.

Mr. Larkin: The stenographer will please read the question.

1114 The Witness: What is that?

Mr. Larkin: I want the stenographer to read the question.

(Question read, as follows):

"Q. Now, your company was organized, was it not, not only to do a manufacturing and trading business, but also a banking business?"

Mr. Elkus: I object on the ground that the certificate of incorporation is the best evidence.

The Special Commissioner: Well, I suppose that is strictly so.

Mr. Larkin: Will this proceeding be held up until we can get the certificate of incorporation?

1115 Mr. Elkus: We will present you with this copy of it, and you can put it in evidence.

Mr. Larkin: I only want to ask the witness what he is bound to know as a fact.

Mr. Elkus: Then, I stand on my objection.

The Special Commissioner: I don't see why, if it is an important part of your case, you should not prove it by proper evidence. If it is a matter of some collateral significance, you might prove it by the testimony of this witness. It does not seem to me to be important. Suppose they did a business they had no right to do, what can we do about it here in the State of New York?

1116 Mr. Larkin: I don't know what we can do.

The Special Commissioner: We could not do anything. It seems to be if they did a banking business they would be bound by it. I don't see what bearing it has upon this controversy here, whether they did a banking or dry goods business. What difference does it make?

Mr. Larkin: It goes to the man's knowledge to judge of financial conditions and things of that kind, matters of that kind.

Q. Mr. Kessler, will you state briefly what business your Manchester house does and has been doing since its incorporation?

Mr. Elkus: I object to that as immaterial. 1117

The Special Commissioner: I will allow the question.

Mr. Elkus: Exception.

The Witness: What is it you wish me to state?

Mr. Elkus: What business do you carry on?

The Special Commissioner: What business, since your incorporation, has this corporation been transacting?

The Witness: Our principal business is dealing in dry goods. We have agents all over the world, and we send travellers all over the world; we sell dry goods to our customers. We buy the goods, finish them, pack them, make them up and send 1118 them all over the world. That is our principal business.

The Special Commissioner: That is your principal business?

The Witness: Yes.

The Special Commissioner: Now what else do you do?

The Witness: We did a little accepting business, some accepting business in New York; and we had two or three other lines; we did an accepting business and sometimes some letters of credit were sent from New York to us, which we paid,—you could hardly call it a banking business,—letters of 1119 credit drawn by Kessler & Company; they had some customers that travelled in Europe, and sometimes they brought us letters of credit, and we made payments against these letters of credit.

The Special Commissioner: Who did, other people besides Kessler & Company?

The Witness: No, not other people.

The Special Commissioner: But Kessler & Company did issue letters of credit on you?

The Witness: Yes, but very few; you could hardly call it banking business.

The Special Commissioner: You are not called

1120 upon to designate it in any way. You can only tell us what you did. Now, was there any other class of business that you did?

The Witness: I cannot fix my mind on anything special. I do not think we did any other business. Our principal business was the dry goods business.

The Special Commissioner: What business did the Frankfort house do?

The Witness: The Frankfort house sometimes did a little accepting business, and sometimes they received payments for us from our customers and remitted us the money; they were our bankers for customers in Frankfort and in that neighborhood.

1121 That is, if we had some foreign bills we sent them to Frankfort and they discounted them and remitted to us, and we accepted for them sometimes.

The Special Commissioner: Bills drawn by the Frankfort house on the Manchester corporation?

The Witness: Yes, by John Phillip Kessler of Frankfort.

Mr. Elkus: Is that the same house?

The Witness: The house in Frankfort was started in 1806, and they did a dry goods business, and in 1830 they started the Manchester business to do a dry goods business, or to buy Manchester goods for the Frankfort house, and that is how the Manchester house was started.

1122 Q. You have said you did a little accepting for other people than Kessler & Company, of New York? A. Well, yes.

Q. Would you be willing to give the names of the other people? A. I have just mentioned John Philip Kessler.

The Special Commissioner: In Frankfort?

The Witness: Yes, in Frankfort. It might happen that a customer of mine, having something to his credit, would draw on us, or ask us to pay his balance to somebody else, but that would not be a regular business at all.

Q. Did you accept any deposits? A. Well, we sometimes had a few deposits; we had a few deposits, yes. 1123

Q. Did you discount notes? A. What?

Q. Discount notes? A. What do you mean by "discount notes"?

Q. Accept notes payable at a future date and give the present cash value for them? A. We?

Q. Yes. A. No.

Q. You have mentioned the fact that you were Chairman of the Board of Directors of the Company? A. Yes.

Q. How many directors are there? A. Well, there are four directors. 1124

Q. Will you please mention the names of the directors? A. There is P. W. Kessler, Phillip William Kessler, and then there is George H. Averdieck and George A. Kessler—George Albert Kessler.

The Special Commissioner: And yourself?

The Witness: And myself, yes.

Q. Do you know the amount of the capitalization, the authorized capital, of your Manchester company?

Mr. Elkus: I object to that as irrelevant, immaterial and incompetent. 1125

The Special Commissioner: I will allow it.

Mr. Elkus: Exception.

The Witness: Two hundred and fifty thousand pounds, nominal capital.

Q. How many of the shares have been issued?

Mr. Elkus: The same objection.

The Special Commissioner: The same ruling.

Mr. Elkus: Exception.

The Witness: I could not give you the exact amount, but somewhere about two hundred and twenty, or a little over that.

1126 Q. A little over two hundred and twenty thousand? A. A little over two hundred and twenty thousand.

Q. Pounds? A. Yes, pounds.

Q. These shares are divided into ordinary and preferred shares? A. Yes, ordinary and preferred shares.

Q. The capitalization is divided equally between ordinary and preferred? A. It was when we started, but it is not now any more.

Q. I mean the authorized capitalization was divided equally between ordinary and preferred, was it not? A. Yes.

1127 Q. So that there would be an authorized capitalization for ordinary shares of one hundred and twenty-five thousand pounds? A. Yes, I think so.

Q. Now, of the ordinary shares, how many were held by the Executors of the estate of William Kessler?

Mr. Elkins: I object to that for the same reason.

The Special Commissioner: Objection overruled.

Mr. Elkus: Exception.

The Witness: As far as I remember 80,000 pounds.

The Special Commissioner: What is the par value.

1128 Mr. Larkin: Five pounds.

Mr. Sprague: Five pounds.

Mr. Larkin: He said 80,000 pounds.

The Special Commissioner: 8,000 pounds?

Mr. Elkus: No, 80,000 pounds.

Mr. Larkin: He said the par value was five pounds.

The Special Commissioner: What is it, Mr. Kessler?

The Witness: I believe they are ten-pound shares, I am not certain.

Mr. Elkus: Five pounds.

The Witness: Five pounds.

Q. How many shares does Henry Kessler—that 1129
is yourself, Henry Kessler? A. Yes.

Q. How many shares do you hold?

Mr. Elkus: I object as irrelevant, incompetent
and immaterial.

The Special Commissioner: I will allow the
question.

Mr. Elkus: Exception.

The Witness: How much do I hold?

Q. Yes. A. I can't give you the exact amount;
somewhere about 5,000 pounds.

Q. Isn't it 5,500 pounds? A. I don't think it
is; somewhere about 5,000, a little over, but I can't 1130
give you the exact figure. It is impossible.

Q. How many shares does P. W. Kessler own?

Mr. Elkus: The same objection.

The Special Commissioner: The same ruling.

Mr. Elkus: Exception.

The Witness: I could not say because it is im-
possible for me to carry all those figures in my
head.

The Special Commissioner: About how many?

The Witness: I could not say about. I gave
Mr. Larkin a list of about, but I said at the time,
"this list is not correct and I can't give it because
I don't know it." 1131

Q. You stated on the list you gave me that P. W.
Kessler held 10,000 pounds of ordinary shares. A.
I said about that, I am not certain. I made it out
of my memory.

Q. This is correct, isn't it? A. I can't say how
many. Mr. Referee, may I say something? Mr.
Larkin was very anxious to get the particulars as
to the shareholders, and I said at the time it was
utterly impossible for me to remember that, and I
can't remember that. Now, afterwards, I taxed
my memory and I tried to do the very best I pos-
sibly could for Mr. Larkin and I said at the time

1132 the list was not correct, but I have made it out as near as I can possibly think, but I can't be bound by it.

The Special Commissioner: You mean by correct, accurate?

The Witness: Yes, accurate. It is impossible to remember it.

Q. About how many shares does Alfred Kessler own of the ordinary?

Mr. Elkus: The same exception.

The Special Commissioner: The same ruling.

Mr. Elkus: Exception.

1133 The Witness: I cannot tell you.

Q. About 3,000 pounds?

Mr. Elkus: I object unless he knows.

Q. About 3,000 pounds? A. I believe 3,000 pounds.

Q. Now, no one has any ordinary shares of Kessler & Company, Limited, other than the members of the Kessler family except Mr. Averdick, isn't that correct?

Mr. Elkus: I object as irrelevant, incompetent and immaterial. How does that concern us.

1134 The Special Commissioner: I don't see how it is relevant or material. It is competent enough if it has any bearing on the issues but I don't think it has.

Mr. Larkin: I am showing, if your Honor please, the reason for this very preference by reason of the family relation, by reason of the fact that the man who made the preference was a shareholder of the Company.

The Special Commissioner: Well, go on.

Mr. Elkus: Exception.

Mr. Larkin: Read the question.

(Question read as follows) :

1135

"Q. Now, no one has any ordinary shares of Kessler & Company, Limited, other than the members of the Kessler family except Mr. Averdieck, isn't that correct?"

A. Our Secretary, Mr. Mazzabech.

Q. He had one share? A. Yes.

Q. Now, according to the statement which you kindly furnished me and which you said was substantially correct—— A. No, it was not substantially correct. It is as correct as I could make it from memory, but I will not be bound by that statement. I could not make it substantially correct. I made it as near as I possibly could. I will be glad to give it to you if I knew it. 1136

Q. The cable is working, isn't it?

Mr. Elkus: I object to that.

Q. You can communicate with your house in Manchester by cable about this matter, can you not?

Mr. Elkus: I object to that.

The Special Commissioner: You may answer the question and I will give you an exception.

Mr. Elkus: Exception.

The Special Commissioner: He wants to know if you can get that information by cabling to Manchester. 1137

The Witness: It would be a very long cable.

Q. Now, Mr. Kessler, this list shows that there have been 118,501 pounds of shares issued and of that amount Mr. Averdieck was 10,000 pounds of shares, all ordinary shares? A. I am not certain about that.

Q. And with the exception of Mr. Averdieck the rest of the ordinary shares are held by the members of the Kessler family?

1138 Mr. Elkus: I object to that. "Members of the Kessler family." That is something which nobody knows what it means.

The Special Commissioner: I think that is too sweeping and too general.

Q. 108,501 shares of the Common stock of Kessler & Company, Limited, are held by the Executors of William Kessler, Henry Kessler, P. William Kessler and Alfred Kessler, isn't that correct? A. I would not be quite sure about that, but I believe so, but I would not be sure about it.

The Special Commissioner: Didn't you prove the relationship of Averdieck?

1139 Mr. Larkin: I haven't yet asked him the question.

Mr. McLaughlin: You did by Alfred Kessler, that there was no relationship or no connection by marriage.

Mr. Larkin: You see I have excluded Mr. Averdieck in my question.

Q. What is your relation to P. W. Kessler and Alfred Kessler? A. We are distantly related. Our fathers were cousins.

Mr. Elkus: Are you trying to contradict by this witness what Alfred Kessler testified to?

1140 Mr. Larkin: No.

Q. Now, in regard to the Preferred shares, Mr. Kessler, Hugo Kessler has 7,000 shares of those shares, has he not? A. I believe so.

The Special Commissioner: Now, who is Hugo Kessler?

Q. Who is Hugo Kessler? A. He is an uncle of Bertie Kessler's; he is a cousin of the family.

Q. A cousin? A. He is a cousin of P. William's and Alfred's.

The Special Commissioner: An own cousin?

The Witness: Yes.

The Special Commissioner: And a distant cousin 1141
of yours?

The Witness: Yes, a distant cousin.

The Special Commissioner: What relation is he
to Alfred, an own cousin?

The Witness: An own cousin, yes.

Q. And Mrs. Manskoph is— A. Mrs. Mans-
koph is my sister.

Q. Now, she has, you think, 2,400 pounds? A.
Yes, I think she has 2,400 pounds; somewhere
about that.

Q. Now, Mrs. M. Manskoph? A. That is Miss,
her daughter.

Q. Miss M.? A. Yes. 1142

Q. What relation is she to Alfred Kessler? A.
None whatever.

Q. And to P. W.? A. None whatever.

Q. No relation? A. No relation. She is the
daughter of my sister and I am second cousin to
Alfred, so that is no relation; you may call it a re-
lation, but I don't call it a relation.

The Special Commissioner: Very distant?

The Witness: Very distant.

Q. She has 1,200 pounds? A. I believe so.

Q. And Marie Manskoph has 1,200 pounds of
shares? A. Yes, I think so. 1143

Q. And is she a sister of the last? A. No, she
is a daughter.

Q. A daughter of whom? A. Of Mrs. Mans-
koph.

Q. Now, Helen Linthe, is she any relation—
A. She is one of my nieces.

Q. One of your nieces? A. Yes.

Q. She has 2,000 pounds of shares? A. Yes; I
believe it is 2,000.

Q. Who is Mrs. K. H. Kessler? A. Mrs. who?

Q. Mrs. K. H. Kessler? What has she?

1144 Q. 10,000 pounds? A. That is Edward Kessler's wife.

Q. Now, who are the Trustees under the settlement of George Kessler? A. I believe there is a man named Sykes.

Mr. Elkus: Do you know anything about it?

The Witness: No.

Q. Did you know the Trustees under the settlement of George Kessler had 5,000 pounds of shares? A. Yes.

Q. You know that? A. Yes.

Q. Who is George Kessler? A. George Alfred Kessler.

1145 Q. Who is George Kessler? A. One of our directors.

The Special Commissioner: Is he a cousin of Alfred's?

The Witness: He is a brother of Alfred's.

The Special Commissioner: A brother of Alfred's?

The Witness: Yes.

Q. William Fred Kessler, who is he? A. Who?

Q. William Fred Kessler? A. That is Mrs. Frederica Kessler, I believe.

1146 Q. 6,500 pounds of shares? A. She is the widow of the late Mr. Kessler.

Q. When you say "the late Mr. Kessler," whom do you mean? A. The late Mr. William Kessler.

Q. And her holdings, you recollect, are 6,500 pounds? A. I would not say that.

Q. Well, substantially, as near as you can get at it? A. Yes.

Q. Now, George A. Kessler has 3,000 pounds of shares? A. I believe so, yes.

Q. What relation is he? A. A brother of—

Q. A brother of Alfred's? A. Yes, a brother of Alfred's.

Q. And P. William Kessler has 10,000 pounds 1147
of shares? A. Yes.

Q. And he is a brother as well? A. Yes.

Q. You are now speaking of preferred shares?
A. Yes.

Q. And Alfred Kessler has 3,000 pounds of
shares, preferred, has he not? A. Yes, I believe
so; I am not certain about it.

Q. Now, Mrs. Ashton has 1,500 pounds of shares?
A. She may have.

Q. What relation is she? A. She is a sister.

Q. A sister of Alfred Kessler's? A. Yes.

Q. And Mrs. Schley, is she a sister? A. Mrs.
who? 1148

Q. Mrs. Schley? A. Schley?

Q. Or Shay?

Mr. Elkus: That is Solle.

The Witness: Mrs. Solly.

Q. Mrs. Solly is what relation to Alfred Kessler?
A. Sister.

Q. She has 1,500 pounds of shares? A. She may
have.

Q. That is your best recollection? A. That is
my best recollection.

Q. Mr. Kessler, according to the list you have
furnished me, the preferred shares issued amount
to 112,000 pounds? A. Yes. 1149

Q. Now, if those 112,000 pounds, it is true, is it
not, that those people whose names I have men-
tioned and just asked you about hold 54,300
pounds? A. Well, I would not say that figure,
but may be somewhere about that.

Q. Well, say, about 54,000 pounds of shares? A.
It may be.

Q. That is as near as you now recollect? A.
Yes.

Q. Now, Mr. Kessler, when did you leave Man-

1150 chester? A. I left Manchester on the 26th of September, on a Thursday.

A. And came directly to New York, did you?

A. I came direct to New York.

The Special Commissioner: Now, we are going into a new branch of the case, and as it is ten minutes to four I think we had better adjourn. We will adjourn until three o'clock on Monday.

HENRY KESSLER (Direct-examination continued).

By Mr. Larkin:

1151 Q. You arrived in New York, Mr. Kessler, on what day? A. Friday, the 4th of October.

Q. And, after your arrival, did you go to the office of Kessler & Company on that day or the day following? A. I went on the day following.

Q. And who did you see at the office of Kessler & Company? A. I saw Mr. McLean, Mr. Bertie Kessler and Mr. Nestly and some of the other gentlemen, but I did not know them.

Q. Was Mr. Alfred Kessler there on that day?

A. No, he was not there.

1152 Q. How long did you stay in the office of Kessler & Company on that day? A. Oh, a very short time.

Q. And after that you went to your hotel? A. Yes.

Q. And then you went to Philadelphia after that? A. I went to Philadelphia only on the Tuesday, the 8th of October.

Q. Now, on Monday, were you at the office of Kessler & Company? A. Yes. On Monday I took my wife to the office. She went with me.

Q. Who did you see there at the office? A. We saw Mr. Alfred Kessler and Mr. Bertie Kessler and Mr. Nestly and Mr. McLean.

Q. How long did you stay there on that day? 1153
A. A very short time.

Q. Were you there on Tuesday? A. On Tuesday I was there, yes, sir.

Q. And alone—unaccompanied by your wife?
A. I was alone on Tuesday.

Q. Who did you see on that day? A. I could not tell you.

Q. You do not remember? A. No.

Q. Did you see Alfred Kessler? A. I dare say I did see him.

Q. How long did you stay there? A. Not a long time—a very short time, I think.

Q. Then, was it on the evening of that day that 1154
you went to Philadelphia? A. No; we went on the 9th; Wednesday, the 9th, we went to Philadelphia.

Q. Were you at the office of Kessler & Company on the 9th before you went to Philadelphia? A. No.

Q. Now, how long did you stay at Philadelphia?
A. Only one day. I took Mrs. Kessler to Philadelphia and came back the same day again.

Q. Then did you go to the office of Kessler & Company on the 10th? A. I did.

Q. And do you remember whom you saw at that time? A. Well, pretty much the same gentlemen. 1155

Q. The same people—Mr. Alfred Kessler, Bertie Kessler, McLean and Magic? A. Yes.

Q. And McLean? A. Yes.

Q. How long were you there on that occasion?
A. Well, I really could not tell you.

Q. An hour or so? A. I dare say, yes.

Q. Well, that was the 10th of October? A. That was Thursday, the 10th.

Q. Now, were you there the next day? A. No. No, come; I made a mistake altogether. I am wrong altogether. I am speaking—I went to Philadelphia on the 8th of October, and I stayed in

- 1156 Philadelphia—I was speaking of the later week. I was in Philadelphia until Monday, the 14th, and then we went to Atlantic City, and we only came back on the 21st. I was mixing the dates up.

By Mr. Elkus:

Q. You stayed at Atlantic City from the 14th to the 21st? A. We stayed at Atlantic City from Monday, the 14th, to Monday, the 21st.

By Mr. Larkin:

- 1157 Q. Now, when you were at Atlantic City, did you or did you not receive a letter from Alfred Kessler? A. I did.

Q. Have you that letter? A. No, I have not.

Q. Do you know what became of it? A. I destroyed it.

Q. Did the letter have any reference to your return to this city? A. He just asked me—he wanted to know where to send my letters.

By Mr. Elkus:

Q. Where he was to send your letters? A. Yes.

By Mr. Larkin:

- 1158 Q. And what else? A. Nothing else.

Q. And when you were to come back? A. Yes.

Q. Did you reply to that letter? A. I replied to that letter that I would be back on Monday, the 21st.

Q. And do you recollect now when it was you received that letter? Was it the last of the week ending on the 19th? A. It was somewhere about that time.

Q. So you came to New York on October 21st? A. On October 21st.

Q. And you then stayed at the Hotel Gotham, did you? A. I stayed at the Hotel Gotham, yes.

Q. Now, on the night of October 21st you had a 1159
call from Mr. Alfred Kessler, didn't you? A.
When?

Q. On the evening of October 21st? A. Yes,
sir.

Q. Alfred Kessler came to see you with his wife?
A. Yes. They telephoned they were coming for
dinner.

Q. And he did come to dinner? A. Yes.

Q. Is that correct? A. Yes.

Q. And you dined together? A. We dined to-
gether, yes.

Q. And, after dinner, he and his wife went up-
stairs to your apartments? A. To my apartments. 1160

Q. Where your wife was? A. Yes.

Q. Now, how long did that visit last? A. A very
short time—about half an hour.

Q. What time did you dine? A. We dined at
half-past seven, I think.

Q. And you remember now what time he went
away? A. I think before 10.

Q. Now, do you remember whether the financial
affairs in the city were spoken of between you and
him? A. No, nothing.

Q. Do you remember whether the difficulty with
the Knickerbocker Trust Company was any way
referred to in your conversation? A. No. 1161

Q. So that financial affairs were not referred to
at all between you? A. No.

Q. You did not talk any business? A. No. The
dinner lasted very long because the waiting was
so slow.

Q. Well, on October 22nd, the next day, you
went to the office? A. Yes.

Q. Now, who did you see at the office. A. Pretty
much the same gentlemen.

Q. Saw Alfred Kessler and Bertie Kessler, Mc-
Lean, Magie, Nestly? A. Yes.

1162 Q. How long were you there? A. I could not tell you that, how long I was there.

Q. Were you there for an hour or so? A. Yes.

Q. Were you there when the Knickerbocker Trust Company closed its doors? A. I don't remember.

Q. You don't remember that? A. No. When did that close?

Q. You do remember, do you not, that the Knickerbocker Trust Company did close its doors?

Mr. Elkus: I object to that.

The Witness: No, I do not remember.

1163 Q. Do I understand you to say that you do not remember now that the Knickerbocker Trust Company closed its doors in this city at all?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant. It has nothing to do with this case in any way.

The Special Commissioner: I do not think it is objectionable.

Mr. Elkus: Exception.

The Witness: I saw it in the papers.

By the Special Commissioner:

1164 Q. When did you see it? A. I cannot tell you. It must have been on the day it was in the papers.

By Mr. Larkin:

Q. Now, Mr. Kessler, when you were there in the office on the 22nd, were you talking about the financial conditions? A. I do not remember what we were talking about.

Q. Were you talking about the conditions of Kessler & Company? A. Certainly not.

Q. Did not talk business at all? A. No, sir.

Q. Did you look at the ticker? A. I looked at the ticker, yes.

Q. Did you talk with anyone about the secur- 1165
ities coming out on the ticker—the prices or any-
thing of that kind?

Mr. Elkus: I object to that as immaterial and ir-
relevant.

Objection overruled. Exception.

Q. Did you? A. I did not understand them at
all. I looked at the other ticker, the ticker that
gave the news.

Q. And you did not understand what is called
the stock ticker? A. No.

Q. Which gives the prices of securities? A. No.

Q. So, if you wanted any information on that 1166
subject, you would have to ask some of the em-
ployes in the office? A. Yes.

Q. Well, did you? A. No, I do not think I did.

Q. You say there was another ticker, a news
ticker, there? A. A news ticker, yes.

Q. And do you know whether—now, can you
recollect whether that ticker announced the suspen-
sion of the Knickerbocker Trust Company? A. I
cannot recollect.

Q. Well, do you remember now any news that
came over that ticker at all on that day? A. No,
I do not remember.

Q. You cannot remember any? A. No, I can- 1167
not remember any.

Q. Do you remember how long you were in the
office that day? A. That I do not remember, sir.

Q. This, you recollect, is the 22nd day of Octo-
ber? A. Yes.

Q. Did you have lunch with Alfred Kessler that
day? A. I believe I had lunch that day.

Q. So I suppose that it is fair to say that you
were in the office or with some representative of
the office several hours at that day? A. Yes.

Q. And do you remember whether you lunched

1168 alone with Alfred Kessler on that occasion? A. No, I believe there were two gentlemen present.

Q. And did those gentlemen make any reference to financial conditions then prevailing in this city?

A. Yes, they spoke about the general financial conditions.

Q. Did they speak favorably or unfavorably?

Mr. Elkus: I object.

The Special Commissioner: What did they say, Mr. Kessler?

Mr. Elkus: I object to what they said as incompetent, immaterial and irrelevant.

The Special Commissioner: I will allow that.

1169 Mr. Elkus: Exception.

By Mr. Larkin:

Q. What did they say, Mr. Kessler? A. I cannot remember.

Q. And who were they that you had lunch with—who were the gentlemen?

Mr. Elkus: I object.

Same ruling. Exception.

The Witness: I believe one was a Mr. Iselin and another was a Mr. McDonald.

Q. Mr. Iselin of Iselin & Company, bankers in this city? A. I could not tell you.

Q. Do you know who Mr. McDonald is? A. Gordon McDonald.

Q. A member of the firm of Speyer & Company, bankers, in this city? A. I believe so.

Q. After luncheon, did you return to the office of Kessler & Company? A. I cannot remember that. I do not think I did, but I will not be sure of that.

Q. Now, do you remember whether you spoke to Mr. Katt on that occasion? A. No. I do not know who Mr. Katt is.

Q. You do not know him? A. No, I do not know him.

Q. Did you speak to Mr. Brettschneider? A. I 1171
have never seen Mr. Brettschneider, to my knowl-
edge.

Q. Do you remember what time you left the office
that afternoon? A. No, I do not.

Q. After you left the office on the 22nd, where
did you go then—to the hotel? A. I would go back
to the hotel and meet Mrs. Kessler.

Q. Now, did you go to the office on the 23rd?
A. No, I did not.

Q. Where did you go on the 23rd? A. I took
Mrs. Kessler to Philadelphia.

Q. Did you go back on the 24th? A. I came back
on the 23rd. 1172

Q. On the evening of the 23rd? A. Yes.

Q. Did you see anybody on the evening of the
23rd? A. No, I came back late.

Q. Went to your hotel? A. Went to my hotel,
yes.

Q. Did you go to the office of Kessler & Company
on the 24th? A. Yes, on the 24th.

Q. Do you rememeber what time you got there?
A. About 10 o'clock.

Q. You met the same people I presume? A. Yes.

Q. As before? A. Yes.

Q. And you stayed there how long? A. That I
could not tell. 1173

Q. Did you talk business with Kessler & Com-
pany on that day? A. No.

Q. Did you talk with them about the general
financial condition? A. Just what I saw in the
papers.

Q. You read the papers, I presume, form day to
day, did you not? A. I read them—not always, but
mostly.

Q. And you talked with whom about the finan-
cial conditions—Mr. Alfred Kessler? A. Very lit-
tle with Mr. Alfred Kessler.

1174 Q. Mostly with Bertie Kessler? A. Mostly with Bertie Kessler, and talked with Mr. Magie.

Q. And Mr. McLean? A. McLean, very little.

Q. Mostly with Bertie Kessler and Magie? A. Yes.

Q. Did you have lunch with Alfred Kessler on that day? A. I do not think so, but I will not swear to that. I cannot remember that.

Q. How long did you stay in the office on that occasion? A. That I do not know; I do not remember, either.

Q. Now, you recollect, do you not, having testified before Commissioner Alexander in the Post Office Building a few weeks ago? A. Yes.

Q. And do you recollect stating that you were down there on the 23rd day of October? A. I did. I wanted to correct that.

Q. You want now to correct that? A. Yes.

Q. Now, on the 23rd or 24th, did you have—

The Special Commissioner: You mean the 24th, do you not?

Mr. Larkin: Yes, I mean the 24th.

Q. Did you have any conversation with any other banker in this city on that day? A. No, I do not think so.

1176 Q. Do you remember consulting with Mr. McLaughlin, your attorney, in this proceeding? A. On Thursday, yes, the 24th.

Q. On Thursday, the 24th? A. Yes.

Q. Now, you had no business relations with Mr. McLaughlin prior to that time, had you? A. I personally had not.

Q. You personally had not? A. No.

Q. Who was it that introduced you to Mr. McLaughlin? A. Mr. P. W. Kessler had had some conversation with Mr. McLaughlin previously.

Q. P. W. Kessler? A. Yes, sir.

Q. When was he here? A. Twelve months ago 1177
—last year.

Q. Did you have any conversations with Mr. Kissel or Mr. Kinnicutt or Mr. Horace Bacon on the 23rd or 24th? A. That I could not tell you.

Q. Well, wasn't it Mr. Kissel or Mr. Bacon or Mr. Kinnicutt that introduced you to Mr. McLaughlin? A. No.

Q. Who took you to Mr. McLaughlin's office or gave you a letter of introduction to Mr. McLaughlin? A. Mr. McLaughlin is a correspondent of our lawyers in Manchester.

Q. I want to know did you go to Mr. McLaughlin's office? A. I took myself there. 1178

Q. You went alone? A. Quite alone.

Q. And that was on the 24th? A. That was on Thursday, the 24th, yes.

Q. Now, I understand that you went to consult Mr. McLaughlin about some estate business, I think you testified? A. Yes.

Mr. McLaughlin: When you say me, you mean my firm, don't you?

Mr. Larkin: Yes. Your firm has a long name, and it is easier to mention you.

Q. You state that, prior to your seeing Mr. McLaughlin, but you do not recollect seeing Mr. Kissel or Mr. Kinnicutt? A. No. 1179

Q. Do you remember to have seen Mr. Kissel or Mr. Kinnicutt or Mr. Horace Bacon at any time at or about this week that we have spoken about? A. I think I did, yes, but I could not remember the date.

Q. You remember it, do you, or do you not, as being sometime in that week? A. I believe so.

Q. Now, which one of these gentlemen did you see? A. I saw Mr. Horace Bacon and then I saw Mr. Kissel, and Mr. Kinnicutt I only saw *en passant*.

1180 Q. Did you see them all at once during this week? A. No, I do not think so. They may have been together, but I do not think so.

Q. Where did you see them? A. At the office.

Q. At their office? A. Yes.

Q. You went to see them? A. I went to see them.

Q. Now, are you able to state whether it was after this interview that you had with Mr. Kissell or Mr. Kinnicutt that you saw Mr. McLaughlin? A. No, I couldn't say that.

Q. In any event, you did see Mr. McLaughlin? A. I did.

1181 Q. And then I understand you to say that your counsel advised you to take the securities which are referred to in this proceeding?

Mr. Elkus: I object to that as leading. Let him ask what was said and done. I have no objection to that.

(Question withdrawn.)

Q. Was this escrow, so-called, referred to in this conversation with Mr. McLaughlin on the 24th? A. It was referred to.

Q. Did Mr. McLaughlin advise you to take possession of that escrow?

1182 Mr. Elkus: I object to that. Let him say what was said and done. I haven't any objection to it.

The Special Commissioner: I suppose that is proper. You may ask him what was said on that occasion—by him and Mr. McLaughlin.

Mr. Elkus: The whole conversation.

The Special Commissioner: In regard to that escrow.

Mr. Elkus: Yes.

Q. Do you remember when it was that you saw Mr. McLaughlin? A. In the afternoon.

Q. About 4 o'clock? A. Somewhere about 4 o'clock.

Q. Now, you had been down town, then all day. 1183
I think you said you came in the morning about 10
o'clock? A. Yes.

Q. And you remained all day down town and you
had an interview with Mr. McLaughlin at 4 o'clock
in the afternoon? A. Yes.

Q. Now, will you state what Mr. McLaughlin
said about whether or not you should take posses-
sion of this escrow?

Mr. Elkus: I object to that. Let him state the
whole conversation.

Mr. Larkin: Well, that is probably a physical
impossibility, and I don't think we need it.

The Special Commissioner: I suggested you 1184
might ask him what conversation they had in re-
gard to this escrow. They say they will not ob-
ject to that, and of course, that is a proper thing.

Mr. Elkus: I think it would be fair to say how
the conversation arose.

Q. Go. ahead, Mr. Kessler, and state what your
conversation with Mr. McLaughlin was.

Mr. Elkus: The whole conversation.

The Witness: I came and asked for Mr. Sprague,
and Mr. Sprague did not happen to be in, and I
saw Mr. McLaughlin, and I spoke to him about this
executors' affairs.

Mr. Elkus: Tell us what you said about it. 1185

The Witness: I said I had just come to see him
about the affairs; that my cousin had seen him last
year and I would like to hear some further infor-
mation from him about this matter, and so Mr.
McLaughlin——

By Mr. Elkus:

Q. What matter? A. About these executors'
affairs—affairs of the executors. So, Mr. McLaugh-
lin said he did not know anything at all about it,
but Mr. Sprague would be in probably very shortly

- 1186 and then we might talk the matter over with him; and so the conversation went on, and then I said that we were doing a large business with the firm of Kessler & Company, and Mr. McLaughlin said he had never heard the name of the firm before. So I explained what the business was, and I told him that we held securities against our long draft acceptances, so Mr. McLaughlin said, "Of course, they are in your possession?" So I said, "They are not actually in our possession, but they are set aside for us—properly pledged to us." So Mr. McLaughlin told me, said, "Well, I do not consider that is safe. I must tell you"—he told me a long
- 1187 case which he had before, where some goods were in the hands of some other people, and so he thought it would be the proper thing for me, as chairman and director of the company, to get the securities in my possession; so I says, "Well, I consider that the matter is perfectly safe just as it is now," and Mr. McLaughlin said he did not consider it safe, and he was very emphatic. He said, "It is your duty to get the securities in your possession; they are, no doubt, properly pledged to you in every way, but still you should hold possession of them"—and so I said, "Well, I must think it over." Mr. McLaughlin and Mr. Sprague both were very em-
- 1188 phatic about it that I must have the possession of the securities, and so I had some further talk with them—things in general—and then they told me again that they insisted on my taking these, as chairman and director. They said, "It is your duty to do so," and so I thanked them for their advice and said, "I will consider it."

By Mr. Larkin:

Q. Now, how long did your interview last? A. Oh, perhaps half an hour.

Q. What was the executorship matter? A. The estate of the late William Kessler.

Q. So you were one of the executors? A. Yes. 1189

Q. What was the phase of the matter which was before Mr. McLaughlin on that occasion? What was the trouble with the estate? A. What do you mean by that?

Q. What was the matter that you had to consult Mr. McLaughlin about regarding the Kessler estate? A. I was not consulting him at all; I was just asking general advice; how this estate was to be worked out.

Q. There was nothing especially acute in that estate at that time? A. No.

Q. Did you know whether Mr. McLaughlin or Mr. Sprague were the attorneys for Kissel, Kinnicutt & Company? A. Certainly not. 1190

Q. Do you remember whether Mr. Kissel or Kinnicutt or Bacon referred to them in the conversation that you had? A. I do not know them at all.

Q. I did not ask you that. I move to strike it out.

Mr. Elkus: I think it ought to stay in.

The Special Commissioner: No.

Q. Now, I understood you to say a moment ago that your solicitors in Manchester were in correspondence with Mr. McLaughlin's firm—were correspondents.

Mr. Elkus: Were correspondents, he said. 1191

The Witness: Yes.

Q. Did you know that before you left Manchester? A. I did.

Q. The William Kessler estate had been in progress of settlement for how long—since 1901? A. I believe so.

Q. And you did not call to see Mr. McLaughlin or Mr. Sprague when you arrived here on the 4th or 5th of October? A. No, I did not.

Q. Did you write any letters to them prior to that time? A. I did not.

1192 Q. You made no appointment with them on October 24th to meet them at 4 o'clock, did you?
A. I did not.

Q. You simply went to their office on that occasion? A. Yes.

Q. Without previous arrangements? A. Without previous arrangements.

Q. Now, on the evening of October 24th, did you have any talk with Mr. Alfred Kessler? A. No.

Q. And your testimony is, as I recollect, that on the 24th you do not remember whether you lunched with Alfred Kessler or not? A. I do not.

1193 Q. And you are unable to state now positively whether on the 24th—it was the day that you saw Mr. Kissel or Mr. Bacon? A. Yes.

Q. Now, after your interview with Mr. McLaughlin and his associates, you went to your hotel? A. Yes.

Q. And you came to the office the next day, the 25th? A. I came to the office the next day, yes.

Q. Now, who did you see? A. I saw the same gentlemen.

Q. The same people? A. Yes.

Q. To whom did you report your interview with Mr. McLaughlin? A. Nobody.

1194 Q. Did you tell anybody in the office that you had any talk with Mr. McLaughlin? A. Certainly not.

Q. To whom did you speak regarding the securities—what you call your “escrow?” A. Well, I spoke to Bertie Kessler and Alfred Kessler.

Q. Did you see Mr. Bertie Kessler that night, the 24th? A. No.

Q. Or Mr. Nestly? A. No.

Q. Nobody connected with the firm? A. No.

Q. And when you say that you did not see them that night, I suppose you also mean that you had no communication with them either by telephone or letter or anything? A. No, I did not have any communication.

Q. Now, on the 25th, what time did you come to 1195
the office? A. Somewhere about 10 o'clock.

Q. To whom did you speak first? A. That I
could not tell you.

Q. Did you speak to Bertie Kessler about get-
ting the securities in the escrow? A. I spoke to
Bertie Kessler that I was going to get my prop-
erty, our property.

Q. And what did he say—"All right?" A. He
said "All right; I will go with you."

Q. Then you and Bertie went over to the safe de-
posit vault, did you? A. Yes.

Q. And Bertie Kessler opened the safe deposit
vault? A. He opened the safe deposit. 1196

Q. And took out the securities which have been
referred to? A. Our parcel.

Q. Took out the securities which are referred to
in this proceeding, did they? A. Yes.

Q. Now, at the time you went over there with
Bertie Kessler, you had a list of the securities
made, didn't you? A. That I am not quite certain
about, whether the list was made then or was made
afterwards.

Q. Well, did you give a receipt in any way for
the securities? A. No, I did not.

Q. Now, Bertie Kessler opened the vaults? A.
He did. 1197

Q. And took out a bunch of securities? A. Yes.

Q. And handed them to you, did he? A. Yes.

Mr. Ekins: Let him say what was done, instead
of leading.

Mr. Larkin: I think I have a right to ask him
specific questions.

The Special Commissioner: You must first get
what information you can from the witness by ask-
ing questions that are not leading, and then you
may, perhaps, refresh his memory if he cannot
recollect.

(Question withdrawn.)

1198 Q. Will you please state what Bertie Kessler and what you did when you were over there in the safe deposit vault? A. We engaged the safe——

Q. Now, before that—I want you to state to the Referee? A. I wish to state it? We engaged the safe first, and, after having engaged the safe, Bertie Kessler took our parcel of securities and we went into one of the rooms with that tin box which we had taken out of that safe which I had engaged for ourselves, and we looked carefully over the securities and checked them off and put them afterwards in the tin box—to find if they were correct—and brought the tin box back to the vault and put
1199 them in the vault and locked it up.

By the Special Commissioner:

Q. Now, with what did you check them off? A. With that envelope. It was stated on the envelope——

Q. With the envelope? A. Yes, sir.

By Mr. Larkin:

Q. And you say you checked them off and found them all there except the Manchester ones? A. Except the Manchester one and another one that was missing.

1200 Q. The Elkton one? A. The Elkton one, yes.

Q. Now, have you a list of the securities which were checked off at that time with you? A. Well, I have not a list of that. I have a list that was made afterwards.

Q. You had no list then with you? A. So far as I remember, I had no list with me.

By the Special Commissioner:

Q. Did Mr. Alfred Kessler have a list? A. No, it was stated on the envelope.

Q. That is the only list you recollect? A. As far as I recollect, yes.

By Mr. Larkin :

1201

Q. Didn't you state before Commissioner Alexander that you had a list, a typewritten list?

A. Well, I am not quite sure about that, that I had that list. I am not quite certain if I had that list then or not. I may have stated so, but—

Q. You don't remember? A. I don't quite remember.

Q. Whether you had a list to check off furnished you at that time or not? A. I don't remember.

By the Special Commissioner :

Q. Didn't you tell me that you had checked off the securities with the list on the envelope that was produced here the other day? A. Not that envelope. One an envelope, yes, sir. 1202

By Mr. Larkin :

Q. The envelope was one that you had in your pocket at the time? A. No, it was in the parcel.

Q. There was an envelope on this parcel? A. Yes.

Q. And you state that you checked the securities thus indicated on this envelope on the parcel? A. I believe so.

Q. And then do I understand you to say that envelope has been destroyed? A. Well, I do not know if it has been destroyed. 1203

Q. You were not at that safe deposit vault on the 24th day of October? A. I was there on the 24th of October.

Q. You went there on the 24th? A. Yes.

Q. You have not said that to-day? A. You have not asked me.

Q. You did not say that before to Commissioner Alexander? A. No, you did not ask me.

Q. And who did you go to the safe deposit vault with on that day? A. I went on that day with Mr. Bertie Kessler.

1204 Q. And Bertie Kessler met you in the safe deposit vault? A. He went with me.

Q. And what did you do on that day? A. We checked the securities.

Q. On an envelope? A. From an envelope.

By the Special Commissioner:

Q. That is, you took the securities out of the envelope and then checked them from the envelope? A. Yes.

By Mr. Larkin:

Q. There were two envelopes? A. There were two envelopes.

1205 Q. And Bertie Kessler had prepared two new envelopes? A. No, he had not prepared anything. I told him the envelope was rather slovenly.

Q. Then what did he do? A. Then he prepared two new envelopes, it seems.

Q. Two new envelopes? A. Yes.

Q. When did he do that? A. I cannot tell that.

Q. When you got the securities on the 25th, did you see the two new envelopes on them? A. Yes, sir.

Q. You saw the two new envelopes on them on the 25th? A. Yes.

Q. And the slovenly envelopes had been taken
1206 off? A. I think so.

Q. What became of the slovenly envelopes? A. Only one was slovenly. The other one was all right.

Q. You mean to say that these two envelopes were—one of them was on the bunch of securities when you were there on the 24th? A. That I could not remember.

Q. Now, how long were you over there on the 24th? What time was it? A. That was the morning.

Q. Morning of the 24th? A. Yes.

Q. Did you tell Alfred Kessler that you were going over there on the 24th? A. I believe so.

Q. Is that your best recollection? A. That is my 1207 best recollection.

Q. Then you took Bertie Kessler with you? A. Yes.

Q. Did Alfred Kessler tell Bertie Kessler to go with you? A. I don't remember.

Q. Now, as a matter of fact, didn't you ask Bertie Kessler to take you over there yourself? A. Yes, certainly.

Q. And you are not positive whether you asked Alfred Kessler about it or not before you went over there? A. No.

Q. Now, do you know what became of the envelopes which you said were slovenly envelopes? A. 1208 No.

Q. Who took those slovenly envelopes—did not you take them? A. No, I did not take them.

Q. You say you used them for the purpose of checking the securities? A. Yes.

Q. What was the use of checking them if you did not keep the evidence of what you had there? A. I could get it out of the loan book.

Q. Had you seen the loan book? A. No.

Q. How did you know you could get it out of the loan book? A. They told me that I could get it out of the loan book.

Q. They did tell you, then, something about the 1209 business of the house? A. No, they did not.

Q. Were the securities replaced on the 24th of October? A. They were replaced.

Q. They were replaced by Bertie Kessler on the 24th? A. Yes.

Mr. Elkus: You mean put back in the safe deposit vaults?

Mr. Larkin: Yes.

Q. You replaced them in the safe deposit vault?

Mr. Elkus: I object to the use of the word "replaced." I do not know what it means.

1210 The Special Commissioner: What word would you like to have him use?

Mr. Elkus: I object to his use of that word and——

The Special Commissioner: You object to the question as leading?

Mr. Elkus: That is possibly the legal form of the objection. I am explicit by saying I think it is not fair to use the word "replaced," if it has any meaning to it.

1211 The Special Commissioner: Well, I suppose he means they took them out and counted them and put them in to one of the little rooms of one of the Safe Deposit companies, and counted them and then put them back into the vault. I suppose that that is what he means. That is the way those things are generally done. They take them out of their vault into a little room and count them and then put them back again into the vault.

By the Special Commissioner:

Q. Is that what you did on that occasion? A. They were put back in the safe.

Q. Is that what you did? You went there on the 24th, in the morning, with Bertie Kessler? A. Yes.

Q. And the vault was opened? A. Yes.

1212 Q. And you took this bunch of securities, did you? A. He took it out.

Q. And he went into a little room? A. That morning we did not go into a little room; just looked at them on a table in the general room.

Q. And did you say you compared them? A. I think we did.

Q. Checked them off? Yes.

Q. What did you check them with that day? A. With the envelope.

Q. Out of which you took them? A. Yes.

Q. Then, when you got done, you put them back into the envelope? A. Yes.

Q. And he put them into the safe? A. Into the 1213 safe where he had taken them from.

Q. And the vault was locked and you came away?

A. Yes.

By Mr. Larkin:

Q. What became of the slovenly envelope? A. I cannot tell you.

Q. Did he put the slovenly envelope back again?

A. Yes, he did.

Q. The next day, when you went there, you saw the slovenly envelope, did you? A. I cannot remember that.

Q. Now, as a matter of fact, wasn't this what 1214 happened; that you took the securities on the 25th over to the office of Kessler & Company? A. No, we did not.

Q. When you went to the safe deposit vaults on the 25th, the envelopes, the new envelopes, had been prepared, hadn't they, by Bertie Kessler? A. I cannot tell you.

Q. Were they prepared by somebody? A. I suppose so.

Q. Well, you know when you took the securities out of the vaults that new envelopes were ready at that time, did you not? A. I think so.

Q. And you took the securities with the new en- 1215 velopes and put them in the safe deposit vault that you secured that morning? A. We took them into the room first—coupon room.

Q. You took them into the coupon room and put the envelope on them and then put them in the new safe deposit vault? A. Put them in the new safe deposit vault.

Q. So you noticed at that time that a new envelope had been prepared? A. I cannot say that I noticed it.

Q. Can't remember that? A. No.

Q. Well, you certainly must have noticed, did

- 1216 you not, that the slovenly envelope, as you call it, was not there any more? A. I did not notice it.

By the Special Commissioner:

Q. You put them in the new box? A. Yes.

Q. When did you go there and look at them again after the 25th? A. A day or two afterwards, I believe, but I could not tell you which day it was.

Q. Did you find them then in the new envelope? A. Yes.

Q. Quite sure of that? A. Yes.

Q. Did anybody have access to the safe except you? A. Yes, certainly.

- 1217 Q. Who did? A. Mr. Bertie Kessler and Mr. Nestly.

Q. After you removed them? A. After we removed them, yes.

By Mr. Larkin:

Q. Having received these securities on the 25th from Bertie Kessler, you then placed them in a new vault or a new box in the same safe deposit company? A. Yes, sir.

Q. Now, that safe deposit box you took out in the name of Kessler & Company, Limited? A. Of Manchester.

- 1218 Q. To whom did you give access to that box? A. I gave access——

Mr. Elkus: Well, I object to that. If it was done by a written agreement, that itself is the best evidence that we can have. I object to any oral testimony upon that subject.

The Special Commissioner: I will allow the question.

Mr. Elkus: May I have an exception?

The Special Commissioner: Yes, certainly.

Mr. Elkus: May I have it appear upon the record in support of my objection that there was a written agreement?

The Special Commissioner: I do not know 1219
that —

Mr. Elkus: May I ask a question in support of
that objection?

The Special Commissioner: You may by and by,
but I do not think the agreement makes much difference.

By Mr. Larkin:

Q. Now, Mr. Kessler, on the 25th of October, you,
having secured a new box in this vault—you and
Bertie Kessler put these securities in it—is that
right? A. Yes.

Q. The box was taken out in the name of Kessler 1220
& Company, Limited, of Manchester? A. Yes.
Yes.

Q. To whom did you give that box? A. That
day I gave access to Bertie Kessler, Nestly and Mc-
Lean.

Q. Now, are you sure you did not give it to Mc-
Lean? A. I said McLean.

Q. Now, how long did those securities remain in
that new box? A. About a week, I think.

Q. About a week? A. Yes.

Q. Did you make any changes in the right of
access to that box in that time? A. Yes, certainly.

Q. What change did you make? A. I took Mr. 1221
McLean out altogether and then afterwards I had
an agreement drawn up—

Q. No, never mind that—just what changes did
you make as to the parties who could go in that
vault? A. I took McLean out.

Q. Leaving Bertie Kessler and Nestly? A. Yes.

Q. You say those securities remained there about
a week in that vault? A. About a week, yes.

Q. And then what did you do with them? A.
Then I placed them in another vault.

Q. In what vault? A. The Hanover Trust Com-
pany's vault.

1222 Q. Now, did you give right of access to that vault to anyone? A. I gave right of access to Mr. Horace Bacon and Mr. Herman Kinnicutt. I believe Herman is his name. I am not quite certain of his name.

Q. Mr. Kinnicutt, of Kissel, Kinnicutt & Company? A. Yes.

Q. And Mr. Bacon, of the same firm? A. Mr. Bacon, of the same firm.

Q. And the same firm that you state you had some consultation with during the week? A. I had no consultation with them.

Q. Well, had a talk with? A. Conversation.

1223 Q. In that week of the 25th of October? A. Yes.

Q. The gentlemen were partners with Mr. Kissel, whom Alfred Kessler testified——

Mr. Elkus: I object to that.

The Witness: I cannot tell you that; do not know.

Q. You don't know whether Kinnicutt or Bacon was a member of the firm of Kissel, Kinnicutt & Company? A. I do not know. I have never seen their partnership papers.

Q. And you say you do not know whether they are members of that firm or not? A. They are members, but I do not know whether they are part-

1224 ners. They are in the office.

Q. Don't you know them pretty well to give control over securities of the value of these which are in the vault? A. I have known Mr. Horace Bacon by name for a long time, and I have seen him seventeen years ago.

Q. And you know Mr. Kinnicutt by name also? A. I know the family.

Q. And you have not seen him for 17 years? A. He was a boy then.

Q. Now, who told you, who advised you, if anyone, to give right of access to Mr. Bacon and to Mr. Kinnicutt? A. My own advice.

Q. Without consultation with anyone? A. 1225
Without consultation with anyone.

Q. You did not consult with Alfred Kessler? A.
No.

Q. You are positive about that? A. Quite positive.

Q. Did you consult with Bertie Kessler? A. No.

Q. Did you ask Mr. Kissel or Mr. Bacon whether they would act for you? A. I asked Mr. Bacon.

Q. You asked Mr. Bacon? A. Yes.

Q. Now, when was it that you asked Mr. Bacon?
A. I do not know.

Q. Did you ask Mr. Kinnicutt as well? A. Yes.

Q. When was it you asked Kinnicutt? A. The 1226
same time.

Q. Was any person present with you when you
saw Mr. Bacon or Mr. Kinnicutt? A. No.

Q. Was Bertie Kessler present? A. No.

Q. Mr. McLean or Mr. Magie? A. No.

Q. Where was it that you saw them; at their
office? A. At their office, yes.

Q. Now, did you go to that vault of Kessler &
Company, of New York, any other time than on
the 24th and 25th of October? A. I went to the
vault, but not to Kessler & Company's vault. I do
not understand the question, though.

1227

By the Special Commissioner:

Q. Now, look here, Mr. Kessler. I think you are
intelligent enough to understand that question, and
if—— A. I mean by the vault, I mean the whole
deposit. I do not mean the one safe. I never went
to their safe. I mean the vault, the whole vault,
with all the boxes.

Q. I ask you if you understood the question. If
you do not, I will explain it. A. I do not.

Q. The theory of the counsel is that this was in
Kessler & Company's vault until you took them
away and put them in your own vault. Now, he

1228 wants to know whether you went to Kessler & Company of New York's box? A. No, certainly not.

Q. Except on the 24th and 25th of October? A. No. I misunderstand, because we call a vault the whole thing.

By Mr. Larkin:

Q. Well, what is it you call the little compartment we are talking about? A. We call those safes.

Q. Safes? A. Yes.

By Mr. Elkus:

1229 Q. Did you take the safe or only the tin box?
A. I took the safe. The tin box is inside.

By Mr. Larkin:

Q. Now, after you were there on the 24th of October with Bertie Kessler, did you tell Mr. Alfred Kessler that you had been there? A. I do not think so.

Q. Did you go back to the office and look at the loan book after you went there? A. I couldn't say if I went to the office or not.

Q. Did you know at that time that the Elkton securities were not there? A. Yes, I did.

1230 Q. On the 24th? A. Yes, they were not there.

Q. Didn't you, when you were examined before Commissioner Alexander, submit a list of the securities which you took on the 25th day of October? A. I think I did, yes.

Q. Now, where is that list? A. I just showed it to you.

By Mr. Elkus:

Q. That is the same one you had before Commissioner Alexander? A. Yes.

Q. And that is the same one you produced here a few minutes ago? A. Yes.

By Mr. Larkin :

1231

Q. Do you remember my asking you when you were examined before Commissioner Alexander, "Did you put in the safe deposit vault all the securities mentioned in that list?" and that you answered "Yes"? A. I think I did, yes.

Q. And that list included the 10,000 shares of Elkton? A. It did, yes.

Q. Now, I understand, Mr. Kessler, that you did not have any meeting of your Board of Directors before you left Manchester? A. No, no special meeting.

Q. And it is a fact that no resolution was passed authorizing you to take the securities? A. Cer- 1232
tainly not.

Q. And you took them, you say, in your capacity as chairman of the Board of Directors? A. Yes.

Q. Now, this matter you considered an important matter, didn't you? A. Yes.

Mr. Elkus: I object to that. What matter is important?

Mr. Larkin: Why, his going to visit Philadelphia with his wife. That is what we were talking about.

The Special Commissioner: He answered the question. Let it stand.

Mr. Elkus: Exception.

1233

Q. Now, did you write a letter to Manchester on the 24th or the 25th of October? A. I wrote a letter to Manchester.

Q. Where were you when you wrote that letter? A. I believe I wrote part of the letter at the office here of Kessler & Company.

Q. And the other part? A. I believe I finished it at the Gotham, but I would not be quite sure of that.

Q. To whom did you write the letter? A. I wrote the letter to P. W. Kessler.

Q. Did you keep a copy of the letter? A. No.

1234 Mr. Larkin (to Mr. McLaughlin) : Have you sent for that letter?

Mr. McLaughlin: Yes.

Mr. Larkin: Have you got it?

Mr. McLaughlin: Yes.

Mr. Larkin: Have you got the original letter?

Mr. McLaughlin: Yes.

Mr. McLaughlin produces a paper.

Mr. Elkus: I suppose if we give it to you you will put it in evidence?

Mr. Larkin: Oh, not necessarily.

Mr. Elkus: Well, I object to them looking at it.

1235 The Special Commissioner: I will allow him to look at it.

Mr. Elkus: Exception.

Mr. Larkin: I offer it in evidence.

Received in evidence and marked Receiver's Ex. 13.

Mr. Elkus: Exception.

Mr. Larkin: I offer it in evidence.

Received in evidence and marked Receiver's Ex. 13.

Receiver's Ex. 13 was read by Mr. Larkin as follows:

1236

"KESSLER & CO.

BANKERS.

54 WALL STREET,

New York, 25 October, 1907.

Dear Willy,

I wrote you on the 22nd inst, and received your 2 letters of 15th and 16th inst., we have had two very miserable & exciting days here, you will have seen all from the papers how Morgan & others helped the Stock Exchange with funds. Alfred just comes with the news that they will issue Clearing-house certificates, this they hope will relieve the money market. The great difficulty is to sell Ex-

change even cheques and this has bothered ¹²³⁷ McLean very much, however he succeeded in getting what he wanted for today; but the position is *very awkward* and we must hope that next week the Exchange market will be better as otherwise K & Co. like many others will be in a hole. I saw Guss yesterday I asked him to buy some of our bills, but he said he did not know what to do with them.

At the suggestion of Alfred I cabled you to-day if you could not arrange from Lloyds a cash advance against Cripple Creek; however I doubt it. Alfred sold a few Stocks, but it is very difficult to get rid of anything ¹²³⁸ & things outside the Stock Exchange are unsaleable & that is the reason why Stocks have gone down so much. The Central Trust Co. called to-day for their loan of \$100,000—; but Alfred could arrange with Wallace to let it lie over until next week. He is naturally very much worried, but I am trying to calm him down. He cabled Flinsch to-day he wanted \$200,000.— by Monday & asked him what he could do to find funds. You have no idea how things are here, the Trust Co. of America was besieged the last two days by depositors wanting their money. ¹²³⁹ Police on horseback and foot kept order in Wall Street. Of course we cannot say where all this will lead to, but things seem a trifle better to-night. Saturday & Sunday may help to calm the excitement.

It is strange I anticipated on your ideas about our Escrow as you will see from my memo of Yesterday. Your & Eddy's letters strengthened my hands & we acted on it at once. I went with Bertie to the North America Safe Deposit Co. Exchange Place secured a small safe in the name of K. & Co.

1240

Lt. Manchester, England, and gave power to Bertie, McLean & Nestle, Bacon would not have done, to open this safe, the combination No. of the lock is 197 & Box No. 2097. We went carefully through all the documents to see that they are all endorsed & in order, the Brooklyn Mortgage has a transfer in blanc by Gillett & his wife, the other notes are all endorsed in blanc. I think we are safe now, anyhow we are in possession of the documents. Alfred has made out a new list at reduced prices, amounting to about \$512,000.—against the £80,000.—credit. The

1241

other £20,000.—are in the separate escrow also in our safe. To get anybody to take care of our bills here in case of need would be very difficult, probably impossible. Brooks would have to help us thro' against the securities we could give him. If K. & Co. can pull thro' which I hope, we must get out of this acceptance business or reduce it considerable. Alfred telephoned for Gillett to come down, he promised to come in the afternoon, but did not. It is most harrassing and annoying that the man is no good and cannot be tackled. I hope Flinsch will be here soon.

1242

Alfred would like you to see if you cannot get a quotation in London about the Underground Electric London in our escrow. Saw Hesslein & Ernst yesterday, the latter is coming over next week; I was astonished what a large place theirs is, about 100 clerks & 2 large warehouses.

Called again on Abbs & asked him to push where he could for remittances. Hemings I saw this morning, he promised a small order presently. McLea I did not find in, but saw some of the goods he gets from Reade & Wall very fine and tasteful things up to 18d. If

Heindt could find some stuff like it for Hess. 1243
 lein we could do a big business. The rest of
 The day I spent at Wall Street & must say
 I have by now had more than enough of it.
 I hope I can get off by the "Baltic" next
 week, but will first see how things are going
 here before I decide. I took Gertie to Phila-
 delphia Wednesday to stay with her sister
 until Monday, when I shall fetch her; this
 relieved me a little as when you have your
 wife on hand and are to look after business
 you are very much handicapped. Bertie &
 Nestle dined with me yesterday & they want
 to take me a Motorride tomorrow. Tues- 1244
 day I am going out to Guss at Morristown.

Weather keeps very fine & cool. I hope
 this will be my last letter & au revoir, love
 from Alfred.

Your affect. cousin,

HENRY.

I added to my cable "Yes" in answer to
 Zimmerman's inquiry about the Coliman
 dinner, but I would rather be out of it, how-
 ever I suppose I had to accept."

1245

New York, December 11, 1907, 10:30 A. M.

Met pursuant to adjournment.

Same appearances.

HENRY KESSLER (Direct-examination resumed).

By Mr. Larkin:

Q. Mr. Kessler, will you please look at the letter
 which was marked in evidence last night, and, hav-
 ing looked at it, please state whether your recol-

1246 lection is not refreshed now so that you can say that the letter was written from the office of Kessler & Company rather than from the hotel? A. I think it is a fact that I finished it at the hotel. But the most of it was at the office, I think.

Q. Will you kindly turn to the postscript on the letter and see whether that was not what you added at the hotel? A. I could not tell you. I should say so.

Q. Now, can you recollect now whether anything else was added at the hotel than the postscript which you see there? A. I cannot remember.

Q. May I see the original letter a moment?

1247 (Witness hands letter.)

Q. Now, did anyone come to see you at the hotel on the evening of October 25th? A. I was under the impression that Nestle and Bertie had come to see me.

Q. On the evening of October 25th? A. That they were dining with me, but that is a mistake.

Q. What is the mistake—that they did come to see you on the evening of the 25th? A. No. They dined with me on the evening of the 24th.

Q. Do you know whether they came to see you on the evening of the 25th? A. I am certain they did not.

1248 Q. Did you go to the office on the 26th? A. 26th? Yes, I was at the office.

Q. And who did you see at the office? A. I believe only McLean, Bertie and Nastle. I believe Alfred was not there.

Q. Was not there? A. I believe not, but of that I am not certain. Yes, I believe he was there. I saw Mr. Alfred Kessler.

Q. How long did you stay there at the office on the 26th? A. Not very long.

Q. Do you remember when you left? A. I left fairly early, but I could not tell you.

Q. Where did you lunch—at the Downtown 1249 Club? A. No, in 49th Street.

Q. With some friends? A. With some friends, yes.

By Mr. Elkus:

Q. With your wife? A. No; she was away.

Q. In Philadelphia? A. In Philadelphia, yes.

By Mr. Larkin:

Q. Did you see anybody on Saturday night or Sunday—either Bertie Kessler or Nestle? A. Saturday I saw Bertie Kessler, because you see I had a motor ride with him. 1250

Q. Your letter says you were going to have a motor ride? A. Yes.

Q. Do you recollect now that you did take a motor ride with Nestle and Bertie on Saturday? A. Yes.

Q. And you were with them for how long on that ride? A. Up to about 6 o'clock, and then we dined together.

Q. You started out after lunch? A. We started out after lunch.

Q. And there was no one else in the party, I suppose, except you three? A. No.

Q. And you came back and dined together that evening? A. We came back and dined together that evening. 1251

Q. And how late did Bertie and Nestle stay after dinner? A. Not very late. I think they left about 9 or half past 9 o'clock.

Q. On Sunday, the 27th, did you see anyone then? A. No.

Q. You did not have a call either from Bertie Kessler or from Nestle? A. No.

Q. And you had no communication with Alfred Kessler? A. No communications from Alfred Kessler.

1252 Q. On Monday, did you go to the office? A. No; on Monday I went to Philadelphia.

Q. Went to Philadelphia on Monday? A. I got back on Monday, the 28th.

Q. What time Monday? A. Oh, about 7 o'clock, I think it was.

Q. 7 o'clock in the evening? 7 o'clock, about.

Q. And on the 29th did you go down to the office? A. On the 29th I went down to the office.

Q. And who did you see at the office then? A. The same gentlemen.

Q. How long did you stay in the office then? A. Oh, I stayed on and off until 4 or 5 o'clock—
1253 something like that.

Q. Now, on the 29th, I understand you to say that you were in the office until quite late in the afternoon. What was it—4 or 5 o'clock, did you say? A. Somewhere about there.

Q. And during that time you saw the same gentlemen that you have mentioned before? A. Yes.

Q. Now, did you have any interview with anybody in the evening of that day after you left the office? A. No.

Q. No one came to see you? A. No.

Q. Did you know Mr. Howard Taylor? A. I just once saw him at the club, but do not know
1254 him.

Q. Do you remember when that was? A. Oh, that was about a week before, something. We were just coming out of the club.

By Mr. Elkus:

Q. You were coming out and he was going in? A. We were just coming out and Mr. Alfred Kessler spoke to him.

By Mr. Larkin:

1255

Q. Now, during the 29th, did you see Mr. Howard Taylor over at the office? A. I do not think I did.

Q. Did you see anybody else on that day, on the 29th, other than the men you have mentioned? A. I believe Mr. Kissel called.

Q. Called where—at the office? A. Yes.

Q. Did you see him there? A. Yes, I saw him.

Mr. Elkus: You mean anybody he knows? I presume he saw other people?

Mr. Larkin: Yes.

Q. You saw Mr. Kissel, did you, at the office? 1256
A. Yes.

Q. What time did he come to the office on the 29th? A. Couldn't tell you.

Q. In the morning or afternoon? A. Late in the afternoon.

Q. Were you present at any conversation between him and Alfred Kessler? A. No, I was not.

Q. Did you see Alfred Kessler and Mr. Kissel talking together? A. Yes.

Q. Where were they talking—in the private room? A. Yes, in the private room.

Q. And that was quite late in the afternoon?
A. Yes, I believe so.

Q. Did you leave the office before or after Alfred Kessler on the 29th? A. I think before. 1257

Q. Now, did you have any communication with anyone you know after you left the office on the 29th? A. No.

Q. Did you have any talk yourself with Mr. Kissel or Mr. Bacon or Mr. Kinnicutt on the 29th?
A. No.

Q. Not on the 29th? A. No.

Q. You refer to some one in this letter which you wrote on the 25th by the name of Guss. Who was that? A. Mr. Gustave Kissel.

1258 Q. Do you know Mr. Kissel quite well—for some years, I presume? A. A great many years.

Q. Did you go to visit him at Morristown? A. I did.

Q. Do you remember when it was that you went to visit him at Morristown? A. It was on Sunday. Would it be the 28th? Sunday, the 27th?

Q. Did you visit him on the 27th? A. Yes.

A. Did you talk business with him? A. No; I did not.

Q. Did you talk over financial matters at all? A. No; I hardly talked with him at all.

Q. When did you go to Morristown to visit Mr. Kissel? A. I believe I left somewhere around the 9 o'clock train Sunday morning.

Q. And stayed all day? A. No; I did not.

Q. Well, how long? A. I got there about a quarter past 11 and left again before 3.

Q. And during the stay, did he refer in any way to the affairs of Kessler & Company? A. No; I hardly saw Mr. Kissel.

Q. Well, anyway, when you did see him, he did not refer to the affairs of Kessler & Company? A. I only saw him at lunch.

Q. And you came back in the afternoon? A. I came back in the afternoon.

1260 Q. Now, on the evening of the 29th, which was Tuesday, did anyone come to see you after you left the office—go to your hotel? A. No; not that I remember.

Q. You had no communications with Alfred Kessler after you left the office on that day? A. No.

Q. And did you go to the office on Wednesday, the 30th? A. I went to the office on Wednesday, the 30th.

Q. And who did you see there? A. I saw the same gentlemen.

Q. Mr. Alfred Kessler and Bertie and Mr. McLean and Mr. Magie? A. Yes. I believe Mr. Alfred was hardly in. 1261

Q. Now, how long did you stay around the office on the 30th? A. Oh, up to about three o'clock or half past three; I do not quite know the time.

Q. Did you know at that time that a general assignment was being prepared?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant. This is now five days after the alleged transaction; it is too remote; it is immaterial and irrelevant.

Objection overruled. Exception. 1262

Q. On the 30th of October when you were in the office, I mean?

Same objection Same ruling. Exception.

A. I do not think so.

Q. When did you hear that Kessler & Company had made a general assignment—the next day?

A. Just before I left I heard they were going to.

By the Special Commissioner:

Q. Before you left your office on Wednesday, the 30th? A. Yes. 1263

By Mr. Larkin:

Q. Mr. Kessler, I notice that you wrote to your Manchester house on the 22nd? A. Excuse me, not the Manchester house, not to the Manchester house.

Q. You wrote to P. Willy Kessler? A. Yes.

Q. On the 22nd day of October? A. Yes.

Q. Did you keep a copy of that letter? A. No, I did not.

Q. I notice that you state in your letter that there were two miserable and exciting days in New

1264 York. What two days did you refer to? A. I could not tell you.

Q. Well, didn't you mean the 25th, the day on which you were writing, and the 24th, the day preceding? A. I referred to earlier dates than that.

Q. Do you notice your statement that "Morgan and others helped the Stock exchange with funds"? A. Yes.

Q. Don't you know that that was on the 24th, the Thursday? A. I can't remember those dates.

Q. That information you received from Alfred Kessler? A. I believe it was in the papers.

Q. You also stated in your letter that Alfred
1265 told you that Clearing House certificates were about to be issued? A. That he did.

Q. Do you remember when that was? A. No, I do not.

Q. You are not able to state now when the issuance of Clearing House certificates was first spoken of to you by Alfred Kessler? A. No.

Q. You do know, don't you, that the money market was in very bad condition at that time, wasn't it? A. Yes.

By Mr. Elkus:

Q. Is that in the letter? A. No.

1266 Mr. Elkus: Well, then, I object to that.

By Mr. Larkin:

Q. You stated that the Clearing House certificates would relieve the money market, didn't you? A. So I was told.

Q. You state in your letter "The great difficulty is to sell exchange, even checks, and this has bothered McLean very much." What did you mean by that statement? A. That we could not sell any exchange.

Q. Couldn't sell any exchange? A. Yes.

Q. And when you say that this bothered Mc- 1267
Lean very much, you mean, don't you, that McLean
could not sell any exchange for the New York
house, didn't you? A. I just asked him. I said
"Can you sell exchange?"

Q. What did you mean? A. If you will let me
explain I can tell you, but——

Q. What did McLean say? A. He said "I
haven't sold any yet, but the day is not out yet."

Q. Your letter says "This bothered McLean very
much"? A. Yes.

Q. McLean was not selling exchange for any
other house, was he? A. He was not, no.

Q. The only exchange that he was interested in 1268
selling was yours? A. Yes.

Q. The selling of exchange—the object of sell-
ing exchange is to secure cash, isn't it—capital
with which to do business?

Mr. Elkus: I object to that. "To secure cash"
I have no objection to, but "To secure capital to do
business with" I object to as calling for a conclu-
sion and incompetent.

Objection sustained.

Q. You know that McLean was trying to sell ex-
change, don't you? A. Yes.

Q. You knew at the time? A. Yes. 1269

Q. And do you know what he was selling ex-
change for—what was the purpose of it? A. I
can't tell you.

Q. What did you mean by stating that "The posi-
tion is very awkward"? A. The financial market
was very awkward, indeed, at that time. The bond
papers said that, and that is just what I mean by it.

Q. What did you mean by saying that Kessler
& Company, "Like many others, will be in a
hole"? A. I was told by people, heard every-
where, that if this difficulty in Wall Street was
going on nobody knew where they would be.

1270 Q. You say in your letter "I saw Guss yesterday." You mean Mr. Kissel? A. Yes.

Q. Having had your recollection refreshed, is it not so that you are able to state that you did see Mr. Kissel on the 24th day of October? A. It seems so.

Q. Do you remember seeing him any time prior to the 24th? A. I dare say I did.

Q. Once or twice? A. I cant' say. About once; perhaps twice; I couldn't say.

Q. You say that you "asked him to buy some of our bills." What did you mean by that? A. Mr. McLean told me "If you see Mr. Kissel, just
1271 ask him if he would buy some of our bills"—that is, of Kessler & Company's bills.

By the Special Commissioner:

Q. You mean drawn on—— A. Drawn on somebody else? That I couldn't say. Drawn on Manchester or perhaps on somebody else.

By Mr. Larkin:

Q. On Manchester or Glynn, Mills, Currie & Company or any one of the different correspondents—is that right? A. I believe so. That is what he meant.

1272 Q. When you say "Our bills" there, you really meant the bills of the New York house? A. Yes.

Q. Now, you also state in your letter that "At the suggestion of Alfred I cabled you to-day if you could not arrange from Lloyds a cash advance against Cripple Creek." Did you send such a cable? A. I did.

Q. Have you a copy of that cable? A. No.

Q. Can you recollect the substance of the cable? A. I believe I just asked "Can you arrange a loan with Lloyds for Cripple Creek securities."

Q. You don't recollect there was anything else in the cable? A. Except the word "Yes." It refers

to the postscript in the letter—— Some private 1273
affair about a dinner.

By the Special Commissioner:

Q. Something different? A. Something different, yes.

By Mr. Larkin:

Q. Mr. Kessler, you sent that cable, didn't you, from the office? A. I believe I did, yes.

Q. And you sent it by code, didn't you? A. Yes.

Q. But you did not write the cable out yourself, did you? A. No, I do not think I did.

Q. You asked Mr. Bertie Kessler to write it out? 1274
A. I believe it was Bertie who did it.

Q. Then you read it over, I suppose, before it was sent, and saw it was right? A. Yes.

Q. And then it was sent? A. Yes.

Q. You didn't keep a copy of it? A. No.

Q. Have you looked for a copy in the office? A. I don't think it will be there. They would not keep a copy.

Q. Why not? A. Because it did not concern them.

Q. Who? A. Kessler & Company. Concerned me only.

Q. You were trying to arrange an advance for 1275
yourself against Cripple Creek? A. I did not.

Q. What did you mean by saying "I cabled you to-day if you could not arrange from Lloyds a cash advance against Cripple Creek"? A. To P. W. Kessler.

Q. And what was the object of your cash advance—for your Manchester house or your New York house? A. The New York house.

Q. Then it was a business in which they were interested? A. Yes.

Q. The New York house—if they could get a cash advance, they would be interested? A. Yes.

1276 Q. What made you say a moment ago that you did not think the cable would be in their papers if they were not interested in it? Why wouldn't that paper be there? A. Because it was my cable.

Q. Well, it related to business in which they were interested, didn't it? A. I don't think that has anything to do with the cable at all.

Q. You were trying to get for them some cash, weren't you, by loan against Cripple Creek? A. I wasn't trying to get anything.

Q. But your letter says "I cabled you to-day if you could not arrange from Lloyds a cash advance against Cripple Creek"? A. That was to be arranged on the other side.

1277 Q. And you arranged that for Kessler & Company of New York? A. I cabled for the other side to try to arrange it.

Q. It was for Kessler & Company and therefore related to their business? A. Yes.

Q. Now, is this the same cable, Mr. Kessler, that you refer to in your postscript when you say "I add to my cable 'Yes' "? A. Yes.

Q. So that your cable, as you recollect, referred to this contemplated request of Lloyds as well as to the dinner referred to in your postscript? A. Yes.

1278 Q. You state that Alfred sold a few stocks. Did he state to you anything about the stocks that he was selling? A. No, he did not.

Q. Did he state to you the price he was selling them at? A. No.

Q. Whether at a profit or at a loss? A. No. I didn't say so.

Q. You state in your letter it was difficult to get rid of anything? A. Yes.

Q. And "things outside the Stock Exchange are unsalable"? A. Yes.

Q. "And that is the reason why stocks have gone down so much"? A. Yes.

Q. How did you obtain that information—from 1279
the newspapers? A. I read it from the newspapers.

Q. Who told you that the Central Trust Company called their loan of a hundred thousand dollars? A. I heard that in the office.

Q. Who told you? A. I couldn't tell you.

Q. Did Alfred tell you that he had arranged with Wallace for a loan? A. I asked Mr. Alfred about it after I had heard of it.

Q. You noticed, did you not, that Mr. Alfred Kessler was very much worried? A. He seemed rather worried.

Q. Who told you that he cabled to Flinsch for \$200,000? A. That I heard in the office, too. I 1280
don't know who told me.

Q. So did you see the cable that was sent to Flinsch on the 25th? A. No, I only heard it.

Q. What time of the day did you hear that? A. Oh, sometime before lunch, I believe.

Q. You are unable to state who told you? A. I am unable to state.

Q. You refer to the fact that the Trust Company of America was besieged by depositors wanting their money, and that police were on horseback and on foot to keep order. You saw that with your own eyes? A. Yes.

Q. And you said at the same time other institutions were closing up, failing? A. I saw that in the 1281
papers, yes.

Q. But you saw with your own eyes about the Trust Company of America? A. Yes, I saw that.

Q. You state in your letter that you could not say what all this would lead to. Did you not contemplate that it might lead to an assignment by Kessler & Company? A. No, certainly not.

Q. You state in your letter "It is strange I anticipated on your ideas about our escrow, as you will see from my memo of yesterday"? A. Yes.

Q. What do you mean by "memo of yesterday"?

1282 A. No, that was the memo I wrote the day before, after having seen Mr. McLaughlin and Mr. Sprague—told him what they advised.

Q. Now, what did you mean by saying "I anticipated on your ideas about our escrow"? A. Because he wrote to me that I should see about the escrow and perhaps consult lawyers and see what I should do in case of necessity.

Q. Have you got those letters? A. No, I am sorry to say I have not.

Q. What became of them? A. I destroyed them.

Q. You state that "Your and Eddy's letters strengthened my hand and we acted on it at once."

1283 Are those the same letters you have just referred to as expressing the ideas of the Manchester house?

A. Well, asking me to see about the escrow.

Q. When you saw Mr. McLaughlin, did you state that you had received those letters? A. I hadn't the letter then; it came later.

Q. You saw Mr. McLaughlin on the 24th? A. Yes.

Q. And this letter was written on the 25th? A. On the 25th.

By the Special Commissioner:

1284 Q. When did you receive the letter? A. On the 25th in the morning.

By Mr. Larkin:

Q. Then, you wrote this letter in the afternoon of the day that you received this? A. Yes, in the afternoon.

Q. You state further on in your letter as follows: "To get anybody to take care of our bills here in case of need would be very difficult—probably impossible." What did you mean by that? A. Oh, my cousin just asked me to think it over in case of an acute crisis arising here in New York—how we should meet our bills.

Q. In this case you refer to obligations of the Manchester house? A. My own personal obligations. 1285

Q. You had reason to believe that a case of need might arise, hadn't you, when you wrote that letter? A. I had no reason to believe that.

Q. You state later on that "Brooks would have to help us through against the securities we could give him." Who is Brooks? A. Brooks is the manager of Lloyds Bank in Manchester.

Q. And when you state that "He would have to help us through against the securities we could give him," you meant the Manchester house and not the New York house? A. Certainly. 1286

Q. And you contemplated, didn't you, that the Manchester house might be involved by the failure of the New York house?

Mr. Elkus: I object to that.

Objection overruled. Exception.

A. No.

Q. Do you mean to say that you did not contemplate at that time the necessity of obtaining aid for the Manchester house under certain circumstances?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant. 1287

Objection sustained.

Q. You state in your letter again, "If Kessler & Company can pull through, which I hope, we must get out of this acceptance business or reduce it considerably." Do you still wish to say that you had doubts as to whether Kessler & Company could pull through? A. I had no doubts.

Q. You state in your letter that Alfred Kessler telephoned for Gillette to come down? A. Why, I heard him do it.

Q. What was said over the telephone? A. I

1288 believe he telephoned he wished him to come down.

Q. Is that all he said? A. Yes.

Q. You knew Gillette was a sick man, in bed?
A. He had been down.

Q. And there was nothing more urgent said over the telephone than a polite request to come? There was no urgency in Mr. Alfred Kessler's request to come down? A. I can't answer that, what Mr. Alfred Kessler's ideas were.

By the Special Commissioner:

Q. He asked you before what you heard Alfred Kessler say over the telephone to Mr. Gillette? A.
1289 I just heard him say he wished him to come down.

Q. He wants to know did he say anything else?
A. I don't think so. I didn't hear it, at least.

By Mr. Larkin:

Q. Mr. Kessler, did you receive cables from the Manchester house during the week beginning the 21st of October? A. No, I don't think I did receive one. I received some letters.

Q. During the week of October 21st? A. What date?

Q. Up to the 26th of October—to and including the 26th of October? A. I don't think I re-
1290 ceived——

Q. You do recollect receiving cables in the week following, beginning the 28th of October? A. Yes.

Q. Have you those cables? A. No, I have not.

Q. Do you remember seeing any cables to the New York house from the Manchester house during the week commencing October 21st? A. No, I don't think I remember any.

Q. Well, when you were in the office did those people show you cables which they may have received from the Manchester house? A. No, they showed me nothing.

Q. They didn't show you anything? A. No.

Q. Mr. Kessler, do you remember from whom you received the Elkton stock? A. From Mr. Bertie Kessler. 1291

Q. Are you able to fix the date when you received it? A. No, I can't remember the date.

Q. You didn't receive it from the assignee of Kessler & Company? A. No, I did not.

Q. You know that when you received it, the assignee was in possession of the estate? A. I did.

Q. And yet you took this from Bertie Kessler without asking permission of the assignee? A. Yes, sir.

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant. 1292

Objection overruled. Exception.

Q. Did you ask permission of the assignee to receive this Elkton stock? A. No, I did not.

Same objection. Same ruling. Exception.

Q. Is there any other member of the Manchester house in this country now? A. No.

Q. I mean a director or officer? A. No.

By Mr. Elkus:

Q. There is no director or officer here? A. No.

By Mr. Larkin:

Q. You stated in this letter, I think, that your recollection was that the cable referred to an application to Lloyds for a cash advance against Cripple Creek, and that you said—the only other thing in it was the reference "Yes" to the dinner engagement. Do you remember that? A. Yes. 1293

Q. Is that your recollection? A. Yes.

Q. I want to see if I can't refresh your recollection, and ask you whether the cable that you sent on the 25th of October did not read like this:

"Yes have secured escrow financial affairs critical cannot sell demand. Is it pos-

- 1294 sible arrange with Lloyds Bank limited cash loan against Cripple."

Now, does that refresh your recollection as to the contents of the cable? A. It does.

Q. And that is the fact? A. I believe that is the fact; but I did not remember it when I spoke about it.

Q. I wish to refresh your recollection about another cable from Kessler & Company, of New York, to Kessler & Company, of Manchester, dated the 26th of October?

- 1295 Mr. Elkus: I object to asking him whether he has recollection of a cable which he never saw and never sent; incompetent, immaterial and irrelevant.

Objection overruled. Exception.

Mr. Larkin: "Large amount are drawing here Cripple sixty nominal." Do you remember that?

The Witness: No, I don't remember that; never heard it.

Q. You refer to a cable which Alfred Kessler sent to Mr. Flinsch on the 25th of October? A. Yes.

Q. Was this the cable that you refer to?

- 1296 Mr. Elkus: I object to that. He did not say he saw the cable.

Mr. Larkin: Now I wish to call his attention to a cable and ask whether the cable I am about to read was not the cable that was sent.

The Special Commissioner: What is that?

Mr. Larkin: He says in the letter that Alfred cabled Flinsch he wanted \$200,000 by Monday and asked him what he could do to find funds.

By the Special Commissioner:

Q. Was that the cable? A. No, I have never heard of that cable.

Q. What do you mean in your letter when you say you had? A. Heard that they had cabled for \$200,000. 1297

Q. Why do you say now you had never heard it? A. I never heard of this cable. They said in the office.

By Mr. Larkin:

Q. I am speaking, Mr. Kessler, of the cable which you refer to in your letter as having been sent to Mr. Flinsch? A. But I understood you to say this was the cable you had just read out to me.

Q. I will read you the cable that was sent to Flinsch. A. Now, what are you going to read? 1298

Q. The cable that was sent. You state in that letter that Alfred cabled Flinsch on the 25th of October. Here is a cable I am about to read to you, dated the 25th: "Financial affairs critical cannot sell demand Central Trust Company has called a loan \$100,000 we require 1,000,000 marks October 28 can you obtain." Is that the cable you refer to in your letter? A. That is the cable I refer to, about \$200,000, but I have not heard anything of the other contents of that cable.

Q. But you do recollect this cable before the one I have read preceding, which says: "Large amount are drawing here Cripple sixty nominal." That you don't recollect? A. I do not recollect. I al- 1299
luded in that to what I wrote there, but it seems it is the next one right now that comes—corresponds to what I have said.

The Special Commissioner: He means to explain, to say that he supposed the first cablegram read was the cablegram to Flinsch.

The Witness: That is what I mean.

By the Special Commissioner:

Q. I understand you to say that you heard nothing about this cablegram to Flinsch, excepting he

1300 wanted a million marks? A. I only know the \$200,000, the million marks. I do not know the other part of the cable.

By Mr. Larkin:

Q. Well, do you know who it was that prepared the cables to Flinsch at Frankfort? A. I don't know.

Q. Was it Bertie or Nestle? A. I couldn't tell you.

Q. You didn't ask anybody, did you, to see the cable? A. No.

Q. You stated that there were some cables that
1301 went to Manchester the week beginning the 28th of October. Do you remember? A. Yes.

Q. Have you copies of those cables? A. No, I have not.

Q. Do you remember that cables were sent from the New York house to the Manchester corporation in that week? A. I can't tell you. I don't remember, no.

Q. I want to refresh your recollection, if possible. I will read you the cable which was sent to Kessler & Company, Limited, of Manchester, on the 29th of October, 1907: "Can do nothing our failure imminent escrow collateral unchanged our
1302 position will be referred to Morgan to-night"—and, having read that, does that refresh your recollection as to such a cable being sent? A. I can't remember it.

Q. Do you remember anything about the Morgan incident? A. I remember Mr. Alfred stated he was going to see Mr. Morgan.

Q. But you didn't know that the failure was imminent even then, did you? A. No, I didn't.

Q. Do you remember another cable being sent to Manchester on the same day, now that your recollection has been refreshed as to that special day? A. No.

Mr. Elkus: By Kessler & Company, of New 1303 York?

Mr. Larkin: Yes.

Q. I understand you to say that you don't remember any other cable? A. No, I don't remember.

Q. I will read you a cable sent to Kessler & Company, Limited, of Manchester, which reads as follows, and ask you whether your recollection is not refreshed so that you can state that you sent the cable yourself: "Escrow in my strong box. Estimated value 600,000 perhaps realize eventually 300,000 stocks in negotiable shape private investments with coupons in my strong box not advisable to disturb stocks at the moment for transfer"? 1304

A. That was my cable, but you asked me if Kessler & Company sent another cable. I would have told you about that.

Q. Will you please tell me any other cable that you yourself may have sent that time or any other time? You sent that cable? A. I sent that cable, yes.

Q. Now, is there any other cable? A. Yes, I sent another cable.

Q. What date did you send that? A. I believe on the 31st.

Q. Now, none of these cables was signed? A. No.

1305

By Mr. Elkus:

Q. None of those were signed? A. None of those were signed, no.

By Mr. Larkin:

Q. And none of the firms were signed? A. No; they never sign a cable.

Q. So it is somewhat difficult, isn't it, to tell which is sent by the firm and which is sent by yourself, unless you can testify to the fact of your

1306 own knowledge? A. Of course I can testify—what I said, I can testify to.

Q. Did you keep a copy of this cable? A. No, I did not.

Q. You kept no copies of any cables that you sent? A. No.

Q. Did you ask anybody in the office to keep copies of the cables? A. No.

Q. Have you at any time made search in the office for any of these cables? A. I would make no search in a strange office.

Q. Did you ask anybody to make a search for these cables? A. No.

1307 Q. Now, Mr. Kessler, who wrote this cable out for you that you identify as being sent by you? A. Either Bertie or Nestle, one of the two; I couldn't tell who did it.

Q. Now, as a matter of fact, you never wrote any of these cables out yourself? A. I made them out and then one of them translated it.

Q. You made it out? A. Well, I just said so and so and—

By the Special Commissioner:

Q. Then they put it in the code? A. Yes.

1308 By Mr. Elkus:

Q. Do you know whether they copied them out in the firm letter books? A. No, they would not.

Q. You don't know whether they would? A. No, but they would not.

Q. Why do you say they would not copy them? A. Because they were my cables.

Q. How do you know they did not do it? A. That I can't tell you.

Mr. Elkus: He means to say by "would not," "Ought not to."

By Mr. Larkin:

1309

Q. Did you give them any instructions not to copy any cables that you sent to Manchester? A. No, I did not.

Q. Now, you do recollect sending another cable to Manchester, do you not? A. I think I sent another one after that one about the escrow being our undoubted property.

Q. I haven't said anything about the escrow being your undoubted property. Was there such a cable as that sent? A. Yes, I sent another one.

Q. October 30th—do you recollect sending this cable to Manchester: "Assigned Kisskin advice, ask Lloyds' Bank Limited Manchester advance against 1310 collaterals escrow cannot obtain advance here now. Stop order shipment Bentley's goods, 800 pounds, with Greesley all paid." Do you remember sending that cable to Manchester? A. I believe I sent that. I didn't remember before.

Q. This Lloyds Bank was the same bank that you referred to in your letter of the 25th, wasn't it? A. Yes.

Q. Under the name of Brooks? A. Brooks, yes.

Q. And it was with the intention of getting Brooks or Lloyds to advance against this collateral that you sent this cable, which was the same idea that you had in your letter here? A. Yes. 1311

By the Special Commissioner:

Q. Do you mean to say that the cable referred to the same thing that your letter did? A. I should like to hear the cable once more.

(Cable again read by Mr. Larkin.)

By Mr. Larkin:

Q. Do you recollect that now? A. Yes.

Q. Now, you state in here "Ask Lloyds Bank Limited Manchester to advance against collaterals

1312 escrow," and the securities you refer to in your letter was the same thing—the escrow collateral, was it? A. Yes.

Q. Do you know what "Kisskin" was? A. It is Kissel, Kinnicutt.

Q. Do you remember a cable that was sent to the Frankfort house on the same day by Bertie Kessler? A. No.

Q. Well, let me read the cable, and see if it refreshes your recollection: "Assigned Manchester may be safe Bertie." Do you remember that?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant. We are not bound by what
1313 Bertie Kessler may have cabled. I object to any cable sent by Bertie Kessler on the 30th of October as having no binding effect upon Kessler & Company, Limited, of Manchester, and as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

The Witness: I haven't heard anything whatever of this cable. I know nothing about it.

Mr. Elkus: I move to strike the contents of that cable from the record as incompetent.

The Special Commissioner: I will let it stand. I don't think it is very relevant, but I will let it stand.
1314

Mr. Elkus: Exception.

Q. You stated, I think, there were some cables passing between the Manchester house and the New York house the week commencing October 28th, did you not? A. I didn't know.

Q. Did you yourself send any cables or receive any cables to Manchester or from Manchester during the week commencing October 28? A. Commencing October 28?

Q. Yes. A. Yes.

Q. How many cables did you send, do you remember? A. No.

Q. More than one? A. I believe I did, yes, sir. 1315

Q. Well, when the New York house received a cable from Manchester, did they not show them to you when you were in the office? A. I couldn't tell that. I don't know what cables they did receive.

Q. Well, did they show you any cables received from the Manchester house? A. I don't think they showed me any cable at all.

Q. Now, I have a cable here dated October 29, from Manchester to the New York house, and I will read it to you and see if it refreshes your recollection.

Mr. Elkus: I object to any cables that passed after the 25th of October, especially this one, as being too remote, immaterial and irrelevant. Besides, it does not appear by the cable that it was sent by the Manchester house. It is unsigned. 1316

Objection overruled. Exception.

Mr. Larkin: "Can you cover 20,000 pounds November 7. Give full particulars escrow. What is present prospect of affairs. You must not draw beyond present amount." Now, does that refresh your recollection?

The Witness: I heard of the first part of the cablegram; I haven't seen that cablegram. 1317

Q. Did you have registered a cable address for yourself personally? A. No.

Q. Didn't you receive cables from the Manchester house—personal cables? A. I did—addressed to Kessler & Company.

Q. Well, addressed to Kessler & Company? A. Yes.

Q. So that cables sent to you from Manchester would come to the Kessler house in New York?
A. Yes.

1318 Q. Now, you wrote to your house in Manchester on the 22nd inst., didn't you? A. Yes.

Q. And this cablegram is dated the 29th inst.? A. Yes.

Q. Can you not state now that that cable was in response to the letter which you sent to Manchester on the 22nd? Do you remember whether you sent, or the house, the New York house, sent an answer to this cable of the 29th which has just been read? A. No, I can't remember.

Q. You stated that the cables, as I recollect your testimony, passed between you and the Manchester house during this period commencing the 28th and 1319 29th and 30th. Now, did you keep copies of those cables? A. No, I did not.

Q. You didn't keep copies of the cables which you may have sent. Did you keep copies of the cables which you may have received? A. No.

Q. And you didn't keep the original copy received from the Cable Company here in this city? A. No.

Q. Did you give them to anybody to keep for you? A. No.

Q. Did you turn them over to Bertie Kessler or anybody to file away? A. No.

Q. What is your recollection as to what happened to them? Did you tear them up and destroy them? 1320 A. I destroyed them.

Q. And you didn't carry them in your coat pocket and take them to your hotel and put them in your papers there? A. No.

Q. Do you keep a portfolio in which you carry business papers? A. No, I keep no business papers when I am travelling.

Q. And you have a present recollection now, haven't you, that you destroyed these cables as they were received by you? A. Yes.

Q. Did you destroy them in the office or in your hotel? A. I destroyed them in the hotel.

Q. So these cables you would receive at the office ¹³²¹
in Wall Street and then take them to the hotel
and destroy them? A. I would, yes.

Q. Are you able to fix the date of the receipt of
the Elkton stock by you from Bertie Kessler? A.
No, I can't fix it.

Q. Now, do you remember what cable you sent
to Manchester on the 29th or 30th? A. No, I don't
remember. I am very bad at dates.

Q. Well, did you send any cable to Manchester
on or about the 29th regarding the escrow?

Mr. Elkus: Objected to as incompetent, immaterial, irrelevant and too remote in point of time.

Objection overruled. Exception.

¹³²²

A. I don't remember that I did. I may have
done so, but I don't remember.

Q. Did you ask anyone in Kessler's office to send
any cable to Manchester about the escrow on the
29th or 30th of October?

Same objection. Same ruling. Exception.

Mr. Elkus: I wish to have my objection apply
to all these questions on this line.

The Special Commissioner: Yes, as to matters
after the 25th of October.

The Witness: If I did send one, I would ask one
of the gentlemen to help me.

¹³²³

Q. If you did, it was Bertie Kessler? A. Either
Bertie or Mr. Nestle, perhaps.

Q. Well, and the same answer would apply if
you sent one on the 28th? A. Yes.

Q. You would write down the cable yourself and
then they would translate it into the code? A. I
would say I would like to telegraph so and so and
would write it out.

Q. And they would translate it? A. Yes, they
would translate it.

1324 CROSS-EXAMINATION BY MR. ELKUS:

Q. Mr. Kessler, did you know Mr. Nestle before you came to this country? A. Oh, yes.

Q. You and his father and you were friends? A. His father was a friend of mine.

Q. So, before you came here, you know of him or knew him? A. He was in our employ in Manchester.

Q. And did you know Bertie Kessler before you came to this country? A. I knew him as a boy, a child.

Q. Those two young men you knew before you came here and knew their parents and knew their people? A. Knew their whole family.

Q. Where did you receive your mail in this country? A. Generally at the office of Kessler & Company.

Q. It was addressed to you there? A. It was addressed to me there; later on, at Kissel-Kinnicutt's.

Q. Now, you wanted to make some explanation of your visit to Morristown that Sunday when you went to Mr. Kissel's. Will you tell the Referee what you want to state here? A. I got out there about a quarter past eleven, and the butler told me Mr. Kissel wasn't in. After having waited a
1326 good half hour, Mrs. Kissel came in and she took me all over the grounds and she was very much distressed that her husband was not there to show me around. We came back again to the house after that and saw Dr. and Mrs. Kinnicutt and waited until about a quarter to three before we went in for luncheon. After we went in for lunch, and while we were there, Mr. Kissel turned up and he told us then that he had gone to see a brother of a friend of his. A friend had been dying very suddenly on account of his business worries, which he had had during this exciting week, and then, of course, the conversation went

on. After dinner, Mr. Kissel lighted a cigar and 1327 said, "I should like to show you some reminiscences of my father's"; and so we went to his private room and there we sat for about a quarter of an hour or ten minutes, till the carriage was ready to take us away. I hardly saw anything of Mr. Kissel at all there.

Q. When did you first have any intention of coming to this country? A. Oh, last year. Last year we wanted to come.

Q. What was your purpose in coming to this country?

Mr. Larkin: I object to that.

The Special Commissioner: I think it is pertinent. Ask him what his purpose was. 1328

By the Special Commissioner:

Q. When did you say you left England? A. September 26th. I took my passage already in June.

By Mr. Elkus:

Q. When did you engage your passage? A. In June, 1907, three months before the time of sailing.

Q. Who came with you to this country? A. My wife.

Q. Did you come on business or pleasure? 1329

Mr. Larkin: I object to that.

The Special Commissioner: I will allow it.

The Witness: I only came on pleasure—purely on pleasure and to see my wife's relations, which she had not seen for 18 years.

Q. Where did your wife have relations? A. In Philadelphia.

Q. What relations? A. Sister.

Q. You came here on the 26th of September? A. We left on the 26th of September by the Cedric, from Liverpool.

1330 Q. And when you got to this country, you arrived here what day? A. The 4th of October, Friday.

Q. Did you have any business papers with you at all? A. Not whatsoever—not even a card.

Q. Were you delegated by your Board of Directors to attend to any business matters in this country? A. Nothing whatsoever. I purely came on pleasure.

Q. How old did you say you were? A. I am in my sixty-eighth year.

Q. Now, when you got to this country, to New York—you arrived at New York, the Cedric arrived at New York? A. Yes.

Q. With your wife. Did you stay in the city at all at first? A. No, we went at once to the Hotel Gotham.

Q. How long did you stay at that hotel? A. We stayed there till the following Tuesday morning.

Q. You arrived what day of the week? A. Friday.

Q. What time? A. In the middle of the day.

Q. About noon? A. About noon.

Q. And when did you first go to Kessler & Company's office? A. I went on Saturday, the 5th of October.

1332 Q. Did you leave any family in Europe? A. No, we have no family.

Q. No children? A. No children.

Q. And had you directed that your mail be—that they write to you or cable you here care of Kessler & Company? A. To write to me but not to bother me with cables.

Q. When you went down that Saturday morning to Kessler & Company did you see Alfred Kessler? A. No, he wasn't there.

Q. You saw Mr. Bertie Kessler, whom you knew, and Mr. Nestle, whose fathers both were old friends of yours? A. Yes.

Q. And did you invite them to call upon you? 1333

A. No, I asked them for dinner as soon as we came back.

Q. From where? A. From Philadelphia—from our trip, where we wanted to go to, which we had not decided then.

Q. Then you stayed in New York? A. Until the following Tuesday.

Q. Did you see Alfred Kessler until Monday or Tuesday? A. We saw Alfred Kessler on the Monday. I brought my wife down town to see him.

Q. She had not seen him? A. For ever so long.

Q. And you took her down on a visit? A. Yes.

Q. To see Kessler & Company's office or the city 1334
generally? A. Yes, and to see Wall Street and so on.

Q. And that was a social call? A. That was a social call, and Alfred asked us for luncheon then.

Q. You and your wife? A. My wife and I.

Q. Did you go to lunch with him? A. To the Downtown Club.

Q. Was any business discussed? A. No.

Q. Was anything said to you about the affairs of Kessler & Company? A. Nothing whatsoever.

Q. And after lunch you went sight-seeing with your wife? A. Yes. We took a drive in Central Park after lunch.

Q. Is your wife an American? A. No, she is 1335
English.

Q. And the next day you went to Philadelphia?

A. No, the next day was Sunday. No, Monday. Yes, Tuesday we went to Philadelphia.

Q. You and your wife? A. Yes.

Q. And stayed there with your wife's sister? A. No, at the Bellevue-Stratford.

Q. And for a week? A. Up to the following Monday.

Q. And then where did you go? A. Then we

1336 decided to go and have a little bit of recess to Atlantic City.

Q. You and your wife alone? A. Yes.

Q. And stayed at Atlantic City for how long?

A. Just one week.

Q. Did you come to New York during those two weeks at all? A. No.

Q. You stayed either at Philadelphia or Atlantic City? A. Yes.

Q. Was your mail forwarded to you? A. Yes, it was forwarded to me.

Q. And then you came, at the end of the second week, to New York? A. No, we came from New
1337 York on a Monday—Monday, the 21st.

Q. Did you get any letters from Alfred at all? A. Yes, one letter.

Q. Have you got that letter? A. No, I haven't got it.

Q. Did you destroy it? A. Yes, I destroyed it.

Q. Was there anything about business in it? A. Nothing at all—wanted to know about my mail and when I was coming back to New York.

Q. Did he write to you anything about hotels? A. He wrote to me about hotels in June already.

Q. When you told him you were coming? A. Yes. He wrote me about the hotels, yes.

Q. Now, on this Monday. You came back on
1338 Monday, the 21st of October? A. Yes.

Q. And then Alfred Kessler and his wife called upon you at your hotel? A. Yes; telephoned that they were coming to dinner. We were quite astonished about it; didn't expect them.

Q. Well, they came and dined with you? A. They came and dined with us. My wife would not come down. She said "I can't get dressed and come down"; so she had her dinner up stairs in the sitting room.

Q. She was ill or what? A. No, she was tired and done up from the journey.

Q. So they came up to your rooms afterwards? 1339

A. Yes.

Q. And that was a social visit? A. That was a social visit—for a short time.

Q. Did you ever examine the books of Kessler & Company of New York? A. Never.

Q. Did you know anything at any time of their business or situation? A. Nothing at all—quite enough to do with my own business.

Q. Now, did Alfred Kessler tell you whether or not these drafts which had been drawn on your firm had been accepted by Kessler & Company of Manchester? A. No, he did not.

Q. You were in Manchester until you sailed, 1340 weren't you, attending to business? A. Yes.

Q. Four drafts were drawn by the New York house of Kessler & Company on Kessler & Company, Limited, for 5,000 pounds each, dated August 27th, 1907, and due 60 days after sight. Do you remember seeing those four drafts? A. Certainly I do.

Q. What did you do with reference to them?

Mr. Larkin: I object to it on the ground that it is incompetent proof.

Objection overruled. Exception.

Q. What did you do with those drafts? A. I gave them to a bookkeeper to have them booked, 1341 and afterwards I accepted them myself.

Mr. Larkin: I move to strike out the words "I accepted them myself" on the same grounds.

Same ruling. Exception.

Q. These four drafts—will you tell the Referee, as you remember them, the contents of the drafts?

Mr. Larkin: I object to that as incompetent proof.

The Special Commissioner: What has become of them?

1342 Mr. Larkin: They are in the hands of the Spool Cotton Company.

The Special Commissioner: Have you got them here?

Mr. Coleman: No, they are on the other side.

Mr. Elkus: They are not in this country, but Mr. Coleman says he is going to cable for them. These will be simply supplementary proof. I think it is proper anyway.

The Special Commissioner: You will cable for them?

Mr. Coleman: Yes.

1343 The Special Commissioner: I deny the motion to strike out.

Mr. Larkin: Exception.

Q. Now, will you tell the Referee—describe these four drafts? What was on them? A. Drawn on sixty days' sight, drawn by Kessler & Company of New York at sixty days' sight on Kessler & Company, Limited, of Manchester.

Q. And they were for how much? A. Five thousand pounds each.

Q. And who presented them to you for acceptance? A. They were sent over by Coates.

Q. What is the name of that firm? A. J. & P. Coates & Company.

1344 Q. Of London? (No answer.)

Q. They were presented by someone? A. They were sent to us for acceptance.

Q. And when you say you accepted them personally, do you mean that? A. I put the name on them.

Q. What name? A. H. Kessler, director.

Q. Of what? A. Of Kessler & Company, Limited.

By Mr. Larkin:

Q. Did you put Kessler & Company, Limited, on them? A. First, "accepted"; then the date;

"Payable at Lloyds' Bank, Limited, London," and ¹³⁴⁵
then the stamp "Kessler & Company, Limited,"
and I filled in "H. Kessler."

By Mr. Elkus:

Q. That was put on each one of these drafts?

A. That was put on each one of these drafts.

Q. And then you wrote your name? A. Yes.

Q. Were these drafts numbered? Did they
have serial numbers? A. Yes.

Q. You don't remember the numbers, do you?

A. No, I could not.

Q. Now, do you remember four drafts for 2,500
pounds each being presented to Kessler & Com- ¹³⁴⁶
pany, Limited, of Manchester? Yes.

Q. On or about the 13th of August, 1907? A.
Yes.

Q. Were they presented to you personally or did
they come under your notice? A. Yes.

Q. Will you describe those drafts to the Referee?

Same objection. Same ruling. Exception.

Q. Do you remember the date of those drafts?

A. No, I don't remember, couldn't remember.

Q. Was it about July 31st, 1907? They were
presented August 13th, you say? A. Yes. Then
it would be about the last of July.

Q. How many drafts were there? A. I believe ¹³⁴⁷
there were four.

Q. For how much each? A. 2,500 pounds.

Q. Drawn by whom? A. Drawn by Kessler &
Company of New York on Kessler & Company,
Limited, Manchester.

Q. Were they sixty or ninety day drafts after
sight? A. I think they would be ninety days.

Q. And who presented them to you? A. That
I couldn't tell you. They may have come through
a bank.

Q. Now, tell us what you did when you accepted

1348 them? A. I put the names—the stamp would be put on.

Q. Was it a rubber stamp? A. It was a rubber stamp.

Q. Accepted, payable where? A. Payable at Lloyd's Bank, Limited, London. Then there was the stamp "Kessler & Company, Limited," and "Director," and I would, in the ordinary course, put my name on it.

Q. Your own name? A. Yes.

Q. Did you do that with each one of these four drafts? A. I believe so.

Q. Is that your best recollection? A. That is 1349 my best recollection.

Q. At each time you accepted drafts did you or did you not write letters to Kessler & Company of New York? A. Our correspondents would write letters.

Q. You mean your clerk? A. Our correspondents, yes.

Q. And who signed the letters? A. Well, most of the letters were signed by P. W. Kessler, but I signed a good many, too.

Q. Were you in Manchester on September 24th? A. Yes, I would be.

1350 By Mr. Larkin:

Q. Do you remember that you were? A. Yes; I left on the 26th.

By Mr. Elkus:

Q. Did you receive two drafts of 5,000 pounds each? A. I don't remember those.

Mr. Elkins: I would like to have the letters that were written—received by Kessler & Company of New York with reference to these eight drafts and acceptances.

Letters produced by Mr. Larkin and handed to Mr. Elkus.

Q. I show you a paper purporting to be a letter¹³⁵¹ written by Kessler & Company, Limited, to Kessler & Company of New York, under date of September 7th, 1907, and marked—stamped “Kessler & Company, received September 13, 1907,” which has been produced by the Receiver from the papers of Kessler & Company, the bankrupt, and ask you if you signed that letter? A. I did; that is my signature.

Q. That is your signature? A. Yes.

Q. Mr. Kessler, have you the letter written by Kessler & Company of New York to your firm in Manchester under date of September 17th, acknowledging the receipt of the letter of September¹³⁵² 7th? A. I haven't got the letter.

Q. Do you know whether it is in existence or not? A. I should say it is in our files in Manchester.

Mr. Elkus: I offer in evidence the original letter written by Kessler & Company, Limited, to Kessler & Company of New York, produced by the Receiver.

Mr. Larkin: I object to it.

Mr. Elkus: And also the letter-press copy of a letter written by Kessler & Company of New York to Kessler & Company of Manchester, under the date of September 17th, acknowledging receipt of¹³⁵³ the letter of September 7th.

Mr. Larkin: I object to the letter from Kessler & Company of Manchester to Kessler & Company of New York, on the ground that it is not any evidence of any facts contained in there, and I object to the letter from Kessler & Company of New York to Kessler & Company of Manchester because it is nothing but a letter-press copy, and there is no evidence that it has been sent or received by the Manchester house.

Objection sustained. Exception.

1354 Mr. Elkus: I want the letters marked for identification.

Marked for identification Kessler & Co., Ltd., Exs. H and I, respectively.

NEW YORK, December 11th, 1907,
10:30 A. M.

Met pursuant to adjournment.

Same appearances.

1355 HENRY KESSLER (cross-examination resumed).

By Mr. Elkus:

Q. I show you a letter addressed to Kessler & Company, Limited, Manchester, dated New York, October 28th, 1907. Have you received that from Manchester since you have been here? A. I have not received it. Mr. Lewis——

Q. Mr. Lewis brought it here? A. Yes.

Q. You have seen it? A. I have seen it, yes.

Mr. Elkus: I offer this letter in evidence.

M. Larkin: I object to the letter. It is simply
1356 that last paragraph down there——

Mr. Elkus: No, the whole letter is important.

Mr. Larkin: I object to it on the ground it is a mere request on the part of the New York house to draw on somebody for something, and it is not any proof of the acceptance of the drafts.

Objection overruled.

Mr. Larkin: Exception.

Received in evidence and marked Kessler & Co., Ltd., Ex. J.

The Special Commissioner: It is admitted subject to your undertaking to prove that he had a

power of attorney—not necessarily written—but 1357
he had authority to write such letters as that.

Mr. Elkus: Very well.

Q. I show you a paper and ask you if that signature is the signature of Kessler & Company, Limited, to your knowledge? A. Yes, it is.

Q. Have you received that through Mr. Lewis, of Manchester? A. Yes.

Q. Was that draft paid, do you know? A. No, it was not paid.

Mr. Elkus: I offer this draft in evidence.

Mr. Larkin: I object to it.

By Mr. Larkin:

1358

Q. Mr. Kessler, you were in New York, weren't you, on the 6th of November, 1907? A. Yes.

Q. Now, you had no personal knowledge whether this paper which you have been asked about was paid by Glynn, Mills, Currie & Company, or not, have you—no personal knowledge? A. No.

Q. When you stated just a moment ago that this paper was not paid, you relied for your information on the paper itself, didn't you? A. Yes, on the paper itself.

Mr. Larkin: I move to strike out this testimony as to all this.

The Special Commissioner: Motion denied.

1359

Mr. Larkin: Exception.

Mr. Elkus: Do you admit the paper?

The Special Commissioner: No, I think not.

Mr. Elkus: Exception. I would like it marked for identification.

Marked Kessler & Co., Ltd., Ex. K for Identification.

By Mr. Elkus:

Q. I show you a letter dated October 26th, 1907, written by Kessler & Company, Limited, and ask

1360 you if that letter was signed by Mr. P. W. Kessler? A. Yes.

Mr. Elkus: This letter is produced, Mr. Referee, from the files of Kessler & Company of New York, having been received on November 2, 1907, and I offer it in evidence.

Mr. Larkin: I object to it as incompetent.

Objection sustained. Exception.

The Special Commissioner: If you have other letters of that kind, you had better put them on the record and take a ruling. I have ruled them out as incompetent to prove the fact of an acceptance, and then you may have an exception.

1361 Mr. Elkus: I will read this letter on the record:

"MANCHESTER, 26th October, 1907.

MESSRS. KESSLER & CO.,

New York.

DEAR SIRS:

We refer to our last respects of 24th inst., as per copy, and beg to own receipt of your favor No. 206.

As instructed, we credit you in B. A. for £52 16s.—Value 25th inst. as against \$256.34 you paid to Louis A. Consmitter (a/c Brandford).

1362

Your draft on us, as per your No. 205, has been accepted to your debit in B.A. as under 203265 £5,000—at 90 days order Colonial Bank. Value 23d January (3/16% commission).

We remain, Dear Sirs,

Yours faithfully,

KESSLER & CO., LIMITED,

P. W. KESSLER, Director.

We just received the enclosed letter (acknowledgment of receipt) from Mr. Bolden.

My dividend (Trust) has not come yet." 1363

(Stamped "Kessler & Co.

Received

Nov. 2, 1907

Ans'd.")

Same objection. Same ruling. Exception.

Marked Kessler & Co., Ltd., Ex. L for Identification.

It is conceded by the Receiver that this and the other letters following are produced by the Receiver from the papers of the bankrupts.

Mr. Elkus: I offer in evidence a letter dated Manchester, October 2, 1907, to Kessler & Company of New York, reading as follows:

"MANCHESTER, 2nd October, 1907.

Messrs. KESSLER & Co.,

New York.

DEAR SIRs:

We refer to our yesterday's requests, as per copy, and beg to own receipt of your favors Nos. 191 and 192, advising us of and covering your drafts on us 202965/8 £20,000 at ninety days' sight on W. L. S. Jackson & Co., which we accepted to your debit in B. A. Value 1st January, 1908 (3/16% commission) and remitted by your order and for account of Messrs. W. L. S. Jackson & Company to the Union Discount Company, Limited, of London. 1365

We note all you say about the matter of Isaac Sowden & Sons. So far, they refuse to pay.

Under to-day's date, we made free to draw on your good selves for £50 on demand on Mrs. Laura Kirkman, and we commend our draft to your protection on presentation.

Please note we have been paid value 3d October £50 to your credit in J. A. in con-

1366

nection with the matter and shall remit a like amount to Messrs. Glynn & Company for your account in 10th inst.

We remain, Dear Sirs,

Yours faithfully,

KESSLER & CO., LIMITED,

P. W. KESSLER, Director."

(Stamped "Kessler & Co.

Received

Oct. 10, 1907

Ans'd 11 M.")

1367

Same objection. Same ruling. Exception. Marked Kessler & Co., Ltd., Ex. M for Identification.

Mr. Elkus: I offer in evidence a letter-press copy of a letter sent to Kessler & Company, Limited, Manchester, dated October 11, 1907, reading as follows:

"P. St. Louis.

OCT. 11TH, 1907.

No. 202.

Messrs. KESSLER & CO., LTD.,

Manchester.

DEAR SIRS:

1368

Confirming our last respects of No. 201, we beg to acknowledge receipt of your favors of 1st and 2d inst., contents of which had our attention. We note with thanks that you collected £3,034 18s. 7d. from Alliance M. & I. Co. for our credit in B. A.

Your draft on us for £50 drawn on Mrs. Laura Kirkman will meet with due protection to the debit of our joint account at 4.85 equal to \$242.50, while we allow for your remittance to Glynn & Co. on the 10th inst. 4.86½ or \$243.25 for the credit of joint account.

Kindly draw on October 21st on Messrs. 1369
Glynn & Co. check for £15,000 for our ac-
count and oblige, dear sirs,

Yours truly,

KESSLER & Co.
ALBERT KESSLER."

Mr. Larkin: I object to that also as incompetent.

Same ruling. Exception.

Marked Kessler & Co., Ltd., Ex. N for Iden-
tification.

By Mr. Elkus:

Q. Did you have any conversation with Alfred
Kessler at any time after you arrived in this coun- 1370
try with reference to the financial condition of his
firm of New York? A. No.

Q. Did you ever examine the books of Kessler
& Company of New York? A. No.

Q. When you went to Mr. McLaughlin, or went
to the office of Mr. McLaughlin, you say, as I
understood, that you went to see him with refer-
ence to the claim of the Kessler Estate? A. Yes.

Q. Of which you are one of the executors? A
Yes.

Q. Do you know whether or not that claim or
that matter had been in the hands of Mr. McLaugh-
lin's firm before you came to this country? A. 1371
They were consulted about it before.

Q. By whom? A. By Mr. P. W. Kessler.

Q. When? A. Just twelve months ago—in
October previous.

Q. Did you have any conversation with P. Wil-
liam Kessler before you came to this country with
reference to your seeing Mr. McLaughlin? I don't
want the conversation; I just want to know
whether you had it or not? A. Yes.

Mr. Larkin: I object to that as leading, and also
stating a fact which cannot be proved.

Objection sustained. Exception.

1372 Q. In your interview with Mr. McLaughlin, did you or did you not say anything to him about your coming to see him because you had been requested to do so by P. William Kessler? A. No, I only referred to the conversation that P. W. Kessler had the previous year with Mr. Sprague.

Q. You referred to the conversation that P. William Kessler had with Mr. Sprague when P. William Kessler was in this country the year before? A. Yes. I referred to that conversation, and Mr. McLaughlin said he did not know anything about it; it was in the hands of Mr. Sprague.

Q. When you went to the office of Kessler & 1373 Company the day after that interview, did you speak to Alfred Kessler? A. Yes.

Q. What did you say to him, if anything, with reference to these securities? A. That I was going to take charge of them.

By Mr. Larkin:

Q. What date was that? A. The 25th.

By Mr. Elkus:

Q. He said, "They are your property; you can take them," or words to that effect? A. Yes.

Q. Was it after or before that that you went 1374 to the Safe Deposit Company with Albert Kessler? A. It was after.

Q. Did Bertie Kessler or Albert Kessler, in your presence, get permission from Alfred Kessler to go to the Safe Deposit vaults?

Mr. Larkin: I object to that as leading.

Objection sustained. Exception.

Q. What, if anything, took place in your presence between Alfred and Albert, with reference to going to the Safe Deposit Company with you? A. Nothing, except that we were together,

Q. Well, who said you were going? A. I said 1375
so, and I told Albert Kessler to come along.

Q. Was that in the presence of Alfred Kessler or
not? A. As far as I can remember, close to his
desk.

The Special Commissioner: He might not have
been there.

The Witness: Yes; I had just spoken to him
before.

Q. He was sitting at his desk at the time? A.
He was sitting at his desk at the time.

Q. Was this immediately following the talk?
A. Yes.

Q. Which ended by Mr. Alfred saying to you,
in substance, "They are your property, and you
can do with them as you please"? A. Yes. 1376

Q. And then you said, "Very well. Bertie,
come along"? A. Yes.

Q. "We will go over there"? A. Yes.

Q. Did Alfred Kessler object? A. No.

Q. And what time was it? A. Early in the
morning, soon after ten, I believe, or about ten.

Q. This was the second time you had seen those
securities since you had been in this country? A.
Yes.

Q. Now, the first time that you went to look at
the securities was the day before that? A. That 1377
was the day before.

Q. Who went with you on that occasion? A.
Albert Kessler.

Q. Did you have any talk with Mr. Alfred prior
to your coming to see those securities? A. I be-
lieve I said I should like to examine the escrow.

Q. What did Alfred Kessler say, if anything?
A. He said "Yes," as far as I can remember.

Q. What was said by you or anybody in Alfred
Kessler's presence with reference to going over on

1378 the 24th to examine the securities? A. Nothing that I can remember.

Q. How did you and Bertie Kessler come to go there? Did you ask him to go? A. Yes.

Q. Did Alfred say anything to him? A. No, I don't think so.

Q. Then you and he went over? A. Yes.

By the Special Commissioner:

Q. Did you ask Albert to go with you in the presence of Alfred? A. That I couldn't state.

By Mr. Elkus:

1379

Q. Now, tell me about the office of Kessler & Company. Was there a private office? A. There was a private office, yes.

Q. And when you came down, then, did you sit in the private office, or did you sit outside? A. No; I was mostly standing about outside.

Q. Now, besides the private office, which was occupied by whom? A. The private office, I understood, was occupied by Mr. Flinsch. He was not present there. Mr. Alfred Kessler's desk was just behind Mr. McLean's, right in front.

Q. In what room? A. The general room.

1380

Q. How many rooms were there? A. There was a big general room. There was a room behind I have never been in—two rooms behind that I don't know, and then there was a private office, and a general room.

Q. This private office, you say, was occupied by Flinsch when he was here? A. So I was told.

Q. Mr. Alfred Kessler had a desk in the general room? A. Yes.

Q. And who else had desks in the general room? A. McLean was sitting in front of him, and another gentleman sitting alongside of Mr. McLean. I don't know his name. And then there was a

little private office behind Mr. Alfred Kessler's¹³⁸¹ desk, and then, alongside this, there were seats of Mr. Nestle and Mr. Bertie Kessler, and then there was the cashier's office, and the telephone girl; but really I haven't been in these places.

Q. So that Mr. Bertie and Mr. Nestle and McLean and Alfred all had desks in the same room?

A. Yes.

Q. And about how large was that room? A. Oh, that part of the room was a good sized room, I should say almost as large as this.

By the Special Commissioner:

Q. About 20 by 20? A. I couldn't tell that. I¹³⁸² mean that part where those gentlemen were. What was behind, I don't know.

By Mr. Elkus:

Q. Was that railed off where they sat? A. The cashier was railed off, and then there was a passage going behind, but I haven't been behind that passage.

Q. Now, when you went over on the 24th of October, did you personally check the securities with anything? A. Yes.

Q. With what did you check them? A. I be-¹³⁸³lieve I checked them with that list on the envelopes.

Q. How many envelopes were there? A. There were two envelopes.

Q. And did you take the envelopes away or leave them? A. I left them there.

Q. Did Bertie Kessler take them away in your presence on the 24th? A. I can't remember that.

Q. Now, when you went over on the 25th, and Bertie went with you, did you have any list of the securities with you? A. I believe I had a list then.

Q. This typewritten list (indicating)? A. Yes, so I believe.

1384 Q. That is the typewritten list you have there?

A. Yes.

Q. Now, did you make this list yourself? A. No.

Q. Who made it? A. It was made in the office.

Q. What office? A. In the office of Kessler & Company.

Q. Of New York? A. Of New York. I asked Mr. Bertie I should like to have a list. I believe he ordered it to be made.

Q. You got that, you think, on the 24th or 25th?

A. Or the 25th; I couldn't say which date.

Q. And I notice some pencil marks in the form of checks. Were these made by you or somebody else? A. I believe these were made by me.

Q. Do you know whether or not—where you made them? Did you make them at the Safe Deposit Company, or somewhere else? A. In the Safe Deposit place, in that private room.

Q. On the 25th? A. On the 25th, I think.

Q. I notice, written in pencil, "Worth nothing." Is that your handwriting? A. Yes.

Q. When did you make that? A. That was put on later.

Mr. Elkus: Mark that for identification.

Marked Kessler & Co., Ltd., Ex. O for identification.

1386 Q. Exhibit O for identification is the same paper about which you were asked questions by Mr. Larkin? A. Yes, sir.

Q. And which you produced at his request? A. Yes.

Q. On the 25th, did you find or did you not find the same envelopes there that were there on the 24th? A. I couldn't tell you that.

Q. You don't remember? A. I don't remember, no.

Q. Do you know whether or not, when you left there on the 25th, the envelopes which have been

produced here were on the securities? A. I couldn't 1387
remember that.

Q. Don't you know whether they were put on
there or not? A. No, I couldn't remember that.

Q. That day, did you execute a paper with Mr.
Bertie Kessler and Nestle, with reference to their
authority to open this box? A. No, that was all
given in the safe deposit vault.

By the Special Commissioner:

Q. Verbally? A. No, they had a form which I
had to sign.

Q. That you signed there? A. I signed it there. 1388

By Mr. Elkus:

Q. That is, access to the box? A. That is, access
to the box.

Q. And afterwards was a formal agreement
drawn up between you by your attorneys? A. Yes.

Q. When afterwards—the same day? A. I don't
know. I couldn't tell you which day it was.

Q. Is this the agreement that you executed
(handing paper to witness)? A. Yes.

Q. With Albert Kessler and Nestle? A. Yes.

Q. With reference to the securities which you
put in the box? A. Yes. 1389

Mr. Elkus: I offer it in evidence.

Mr. Larkin: Your Honor, I have to object to
this agreement made between Kessler & Company,
of New York, and Kessler & Company, Limited,
of Manchester, on the ground it is incompetent and
immaterial, as far as the Receiver is concerned.

Mr. Elkus: The purpose of it is to show what
authority Nestle and Bertie Kessler had. I offer
it for whatever it proves outside of that, too.

The Special Commissioner: It is admitted for
the sole purpose of showing the authority Nestle

1390 and Bertie Kessler had with reference to access to these securities.

Received in evidence and marked Kessler & Co., Ltd., Ex. P.

By Mr. Elkus:

Q. On or about the 25th day of October, did you execute the paper which I now show you? A. Yes.

Mr. Elkus: I offer it in evidence.

Admitted for the same purpose for which the preceding exhibit was received, and marked Kessler & Co., Ltd., Ex. Q.

1391 Q. I notice in the statements from the loan books of the so-called escrow of Kessler & Company, Limited, with reference to 1606 shares of stock of the United Lighting and Heating Company, that they are stated to be in Manchester. Do you know anything as to that stock? A. Yes; I believe I can tell you the particulars. I believe they were in the hands of Lloyd's Bank at one time. Then Lloyd's Bank wanted some other securities—as far as I can remember, I make this—and they were handed over to us.

Q. By whose direction? A. I should say by direction by Kessler & Company, of New York, but that
1392 I can't say.

Q. Kessler & Company, of New York, knew, to your knowledge, of your holding the securities? A. I couldn't say that. I should say so, but I couldn't say that.

Q. Do you know, as a matter of fact, that these securities are now in the possession of Kessler & Company, Limited? A. I don't know it.

Q. The 1606 shares? A. No.

Q. Did you ever see them there? A. I couldn't tell.

Q. Your attention was called yesterday to a cable which you said you sent to your Manchester

house on October 25th, in which you said, "Yes, 1393
have secured escrow." Did you refer then to the
fact that you had placed the securities in a box
in your own name? A. Yes, I think so—in Kess-
ler & Company, Limited.

Q. "Financial affairs critical." When you said
that, did you or did you not refer to the general
financial affairs over here in America, or to any
particular affairs? A. To the financial affairs in
Wall Street.

Q. You got your information from the news-
papers, and general conversation? A. I got it from
the newspapers and general conversation.

Q. Did you refer to the financial affairs of Kess- 1394
ler & Company, of New York? A. No.

Q. "Is it possible arrange with Lloyd's Bank,
Limited, cash loan against Cripple." That you
cabled to see if they could borrow money on Crip-
ple Creek stock? A. At the request of Mr. Alfred
Kessler.

Q. He asked you to cable that to your company
in Manchester? A. Yes.

Q. And it was for them that you were cabling?
A. Yes.

Q. Now, you did speak of hearing that Kessler
& Company, of New York, had cabled Mr. Flinsch
to get a loan of \$200,000, or a million marks? A. 1395
I did.

Q. Where did you hear that—just general con-
versation? A. Somewhere about the office—gen-
eral conversation.

Q. Did Alfred Kessler say to you why he was
going to see Mr. Morgan—what he was going to see
Mr. Morgan about? A. No. He said he was going
to see Mr. Morgan.

Q. Do you know whether or not copies were kept
by any clerk in the office of Kessler & Company
who translated your cables into code? A. No.

1396 Q. Did you tell them to keep them, or not? A. No.

Q. Did you have anything to do with the cables sent by Mr. Albert Kessler which have been referred to here, signed by him as "Bertie"? A. No.

Q. Did you tell him to send it? A. No.

Q. That is the date, October 30th? A. No.

Q. Now, to come to that letter, about which you have been asked some questions. You were asked, among other things, in this letter you say, "We have had two very miserable and exciting days." When you used the word "we" there, do you refer to any one in particular? A. I referred to every-

1397 body about Wall Street and everywhere else.

Q. And the excitement was because of the run on The Trust Company of America, which you could see or had seen some signs of? A. Yes.

Q. And on some other banks? A. Yes.

Q. You end that sentence—"You will have seen all from the papers, how Morgan and others helped the Stock Exchange with funds"? A. Yes.

Q. Did you get your news from the papers, or from the stock ticker, or how? A. I got it mostly from the papers, and I saw some of that on the general ticker.

Q. The news ticker, they call it? A. Yes.

1398 Q. "Alfred just comes with the news that they will issue Clearing House certificates." That was public, everybody knew that? A. Yes.

Q. Did it come out on the news ticker? A. Yes.

Q. You say, "They will issue Clearing House certificates." Did you mean that Alfred Kessler & Company were going to issue Clearing House certificates? A. No.

Q. You used the word "we" and "they" as separate words? A. And alone.

Q. "They hope will relieve the money market." Did you mean the money market of Kessler & Company? A. No, the general money market.

Q. Mr. Larkin asked you particularly about this: 1399
"The great difficulty is to sell exchange, even checks, and this has bothered McLean very much." Did McLean speak to you about that? A. He only once said, "It is very difficult just at present to sell exchange."

Q. Did he also say to you what you wrote here: "However, he succeeded in getting what he wanted for to-day"? A. He told me in the afternoon, "I got all I required."

Q. That is the 25th day of October? A. The 25th of October.

Q. When he said he got all he required, does that mean he sold all the exchange he wanted to sell? 1400
Is that what you understood him to say? A. Yes.

Q. Is that what you meant when you wrote this? A. Yes, sir.

Q. That McLean succeeded in getting what he asked for? Is that what you said? A. Yes.

Q. Now, then, you go on to say: "But the position is very awkward." Now, did you refer to any particular firms or any particular position? A. Certainly not.

Q. To what position did you refer? A. To the position of the general financial market in Wall Street.

Q. Did you receive a letter from P. William Kessler that you had been asked about, about this time, or a few days after, which is referred to in here? 1401
A. Yes; it is referred to later.

Q. Did that letter enclose a newspaper clipping? A. It enclosed a newspaper clipping, I believe, from the *Financial News*, but I would not be certain of that.

By the Special Commissioner:

Q. Is that a New York paper? A. No, a London paper.

1402 By Mr. Elkus:

Q. Did you get a letter from Edward Kessler that enclosed a clipping? A. No. The letter was enclosed.

Q. In the letter of P. William Kessler was enclosed a letter from Edward Kessler which contained the newspaper clipping? A. No; it was another newspaper clipping that P. W. Kessler sent me out of the *Financial News*, but I couldn't say that it was in the identical letter that you refer to now.

Q. Did that clipping refer to Kessler & Company, of New York? A. No, to the general American money market outlook.

Q. It said America was going bankrupt? A. Yes, something of the sort.

Q. Did it say any particular concern was going bankrupt? A. No.

Q. Did it say the American Government was going to fail to pay its debts? A. No. But that clipping of the Scotch paper was not enclosed. Mr. Edward Kessler couldn't find it at the time.

Q. He wrote to you about it? A. He just wrote, "I have read a very pessimistic article about America in the *Scotsman*, and tried to find it and send it over."

1404 Q. That was not enclosed? A. But I received a cutting out of the London *Financial News*, either in that letter or in another letter, in which the condition of the New York financial market was stated.

Q. Then you go on and say: "We must hope that next week the exchange market will be better, as otherwise K. & Co., like many others, will be in a hole." Did you have anything to base your statement on that Kessler & Company, in particular, "will be in a hole"? A. No.

Q. Was or was not your statement general as to

practically everybody in Wall Street? A. Every- 1405
body in Wall Street.

Q. Now, you have been asked about seeing Mr. Kissell about buying "some of our bills"? A. Yes.

Q. Did you refer to bills drawn by your firm of Manchester? A. No, I referred to bills drawn by Kessler & Company, of New York, on Kessler & Company, Limited, of Manchester.

Q. And that was what you meant by "our bills"? A. Yes.

Q. Bills accepted by you? A. Yes.

Q. Now, you refer in the next sentence of the letter to the cable which you have been asked about, about Alfred Kessler asking you to cable for a cash 1406
advance against Cripple Creek. Did he say anything to you as to why he wanted that money? A. No, he did not.

Q. Do you know what stocks Mr. Alfred Kessler sold on the Exchange? A. No, I do not.

Q. Or out of the Exchange? A. I did not know.

Q. Did he tell you how much he realized from that? A. No, he did not.

Q. Did he tell you why he sold them? A. No, he did not tell me why he sold them.

Q. You say "The Central Trust Company called to-day for their loan of a hundred thousand dollars." Did Mr. Alfred Kessler tell you of that? A. 1407
I believe Mr. Alfred Kessler just dropped the remark in an offhand sort of a way that the Central Trust Company had called the loan.

Q. Did he tell you afterwards that he had arranged——? A. Yes.

Q. That he had arranged with Wallace to keep it open until next week? A. Yes.

Q. Is he the president of the company? A. I don't know.

Mr. Larkin: It is admitted that Wallace was the president of the Central Trust Company—the Wallace referred to.

4
6
9

1408 Q. You used the words "Alfred can arrange." Do you mean "could" or "would," or "had" or "did"? A. I suppose "did."

Q. Now, the letter goes on and says: "He (I presume you refer to Alfred) is very much worried." What did he say to you that led you to believe he was worried? A. Well, everybody was worried at that time.

Q. That was the general feeling? A. That was the general feeling, yes.

Q. Is Mr. Alfred Kessler a man of confiding disposition?

Mr. Larkin: Well, I object to that.

1409

Objection sustained.

Q. Did he confide in you?

Mr. Larkin: I object to that.

The Special Commissioner: That calls for a conclusion. You have a right to ask him about all the conversation he had.

Q. "I am trying to calm him down." Now, what did you do to try to calm him down? A. I said "You must not bother so much about it. Things will all settle themselves in the money market again." I have no experience of the American money market at all.

1410

Q. You told him that things generally came out right? A. Yes.

Q. Now, you were somewhat excited yourself, I suppose, when you wrote this letter, by having seen these runs going on around there. Were you or were you not excited because of the crowds in Wall street? A. Yes. I had never seen anything of the sort before, and it struck me as being most exciting to everybody concerned.

Q. Now, you say at the end: "Things seem a trifle better to-night." What did you mean by that?

Mr. Larkin: I have not asked him anything 1411
about "things seem a trifle better to-night," and,
so long as I had not opened the door to cross-ex-
amination, the letter sufficiently explains itself.

Objection sustained. Exception.

Q. You state in here, "If K. & Co., which I hope,
—that referred to Kessler & Company? A. Yes.

Q. Had you any doubt in your mind at that
time that they would pull through? A. No.

Q. Was any fact communicated to you that
caused you to doubt that? A. Nothing at all.

Q. With reference to Gillett, you were asked
about that. Do you know whether or not it was 1412
said in the office at the time that you were writing
this letter that Gillett was sick? A. I knew he was
sick, yes. Everybody said he was sick.

Q. Did you have that in mind when you wrote
that—"The man is no good and cannot be
tackled"? A. Yes.

Q. You meant on account of his being sick? A.
I meant on account of his being sick, yes.

Q. Now, "Alfred would like you to see if you
cannot get a quotation in London about the Under-
ground Electric in our escrow." What was the
fact in reference to that? A. He just said, "Can't
you get Willy to get some quotation in London
about this Underground Electric, London." 1413

Q. It was a London corporation? A. It was a
London corporation.

Q. Who are Hesslein & Ernst? A. Hesslein is a
cousin of ours—Noyes, Hesslein & Company. Mr.
Hesslein is a partner there, and Mr. Ernst is a
buyer who comes over to England.

Q. "The rest of the day I spent at Wall street."
You were writing at the close of the day? A. Yes.

Q. "I spent at Wall street and am sure I have
had now more than enough of it." That is refer-

1414 ring to the excitement? A. The whole excitement and everything.

Q. Wall street was crowded? A. Yes.

Q. You didn't take your wife to Philadelphia that day, did you, Wednesday? A. I took her on Wednesday, yes.

Q. That was when? A. Wednesday, the 23d.

Q. As I understand you, Mr. Kessler, this matter of this escrow came up after you came to this country—of your changing the place where the securities were kept—came up after you came to this country? A. After I had seen Mr. McLaughlin.

1415 Q. And that was the business to which you referred in this letter? A. Which business?

Q. You say here: "This relieved me a little, as when you have your wife on hand and are to look after business you are very much handicapped"?

A. Yes, and then seeing these customers—Mr. Hemings—

Q. And that took up your time which you could not spend with your wife? A. Yes, took up a great deal of time.

Q. Now, "Bertie and Nestle dined with me yesterday." Did you invite them to dine with you?

A. Yes, I invited them to dine with me at the Gotham.

1416 Q. Because of the fact that their parents are old friends of yours? A. They are old friends of mine, both of them.

Q. In your talk with Mr. McLaughlin, when you went to his office about the estate matter, did you refer—was the matter imminent then because of any change in the partnership of Kessler & Company which was to take place January, 1908? A. I don't think I referred to it.

Q. Not the estate matter? Did that have anything to do with it? A. Yes; I thought you said

the ticker matter. The estate matter; yes, certainly I referred to it. 1417

Q. You referred to what? A. That the partnership came to an end at the end of the year.

Q. And that was the reason you came to speak to him about it? A. Yes, that was the reason I came to speak to Mr. Sprague about it.

Mr. Elkus: I offer in evidence a letter, dated Manchester, the 24th of September, 1907, produced from the files of the Receiver, which is as follows:

"via S'hampton,
Manchester, 24th September, 1907.
Messrs. Kessler & Co.,
New York. 1418

Dear Sirs:

We refer to our last respects of 21st inst., as per copy, and beg to own receipt of your favors Nos. 5/188 advising us and handing us your six drafts on us 202836-41 £15000 at 90 days' sight on Uhlfelder, Thompson & Co., which we accepted to your debit in B A value 23d December (3/16% commission), and remitted to the Anglo Foreign Banking Company, Ltd., London, as requested by your good selves.

Your two drafts on us, No. 202828/9 £10,000 at 90 days' sight order John Munroe & Co. have also come forward and been accepted to your debit in B A value 23d December (3/16% commission). 1419

As requested, we credit you in B. A. for £2:9:6 value 23d September as against \$12 you paid to the Journal of Commerce & Commercial Bulletin.

The two bills enclosed in your No. 186 654474 £1510:10:2 at 60 days' sight
475 £1516:1:6 at 60 days' sight
(on Union Bank of Manchester,
Limited, Manchester),

1420

we were told by the drawees, should have been drawn on their Oldham Branch, to whom they were forwarded. There will consequently be a little delay, but we hope to be able to forward them in due course to the Union Discount Co. Ltd. of London, London—duly accepted.

Your memo. of 16th puts bill 202744 right.

We apologize for not having credited you before now for 6/3 for Merida information, but do so in new account.

We remain, dear sirs,

Yours faithfully,

1421

KESSLER & CO., LIMITED,
P. W. KESSLER, Director."

(Stamped "Kessler & Co.
Received
Oct. 3, 1907
Ans'd M")

Mr. Larkin: I make the same objection as to the other letters which have been offered.

Same ruling. Exception.

1422 Letter marked Kessler & Co. Limited Exhibit R for identification.

Q. I show you a letter press copy of a letter—a duplicate original it is, really of a letter—purporting to be written by Kessler & Co. to Kessler & Co., Limited, Manchester, under date of October 4, 1907, and ask you if you know the signature there? A. Yes.

Q. "Alfred Kessler"? A. Yes.

Q. In his own handwriting is the postscript?
A. Yes.

Mr. Elkus: I offer this in evidence, and read it 1423
as follows:

"No. 199

OCT. 4th, 1907.

Messrs. Kessler & Co., Ltd.,
Manchester.

Dear Sirs:

We confirm our last respects of No. 198
and are in receipt of your favors of the 24th
and 25th ult., contents of which are duly
noted.

We beg to advise having received \$100.33
from A. Robertson & Co. £20:12:6, and we 1424
have paid \$38.25 to the Commercial Cable
Co. for which please credit us at 4.85 with
£7:17:9, both for account of Bradford.

We remain, dear sirs,

Yours truly,

KESSLER & Co.

Mr. and Mrs. Kessler arrived to-day, but
it was pouring so only Robert met them.
We expect Mr. K. at office to-morrow."

Q. The very last part of the letter is in the hand-
writing, you say, of Mr. Alfred Kessler? A. Yes. 1425

Mr. Larkin: I object to it on the ground it is
incompetent and I renew my objection that what-
ever Alfred Kessler may have written, that is no
proof of any fact as against the Receiver.

Same ruling. Exception.

Marked Kessler & Co., Limited, Exhibit S
for identification.

Mr. Elkus: I offer in evidence a letter written
August 13th, 1907, by Kessler & Co., Manchester,

1426 England, brought here by the Receiver. It reads as follows:

"MANCHESTER, 13th August, 1907.

Messrs. Kessler & Co.,
New York.

Dear Sirs:

Confirming our respects of 10th inst. as per copy herewith, we are since in receipt of your favors Nos. 161/4.

Your drafts on us as under have come forward and been accepted.

202121	£2500	
1427	2	2500 Order Anglo S. American Bank.
	3	2500
	4	2500
		£10000

(3/16%)

Value 11th November to your debit in B A.

We have noted your payment \$300 at 486 £61:14:8 to Mr. E. J. Abbs account Bradford to your credit in B A Value 12th inst. and that you have received the equivalent of £76:-:4, also account Bradford to your debit in B A Value 12th inst.

1428 From No. 163 we withdraw your remittance in check for £1300 on demand on Glynn & Co. to your credit in B A Value 13th inst.

We also withdraw (from No. 162) check £2:-:4 equivalent of New York Dock Co. coupon cashed, and passed same on to Mr. G. Schulze.

We note with thanks that you remitted £531 to Mr. M. C. McIlvaine, Jacksonville, Fla., and the equivalent with charges £109 10:8. We expect to advise you by an

early mail as having been refunded to us by 1429
Mr. I. Harold Birley here to your credit.

We are, dear sirs,

Yours faithfully,

KESSLER & Co., LIMITED,

P. W. KESSLER, Director.

(Stamped: "Kessler & Co.,

Received Aug. 22, 1907

Ans'd 23 M")

Same objection, same ruling. Exception.

Marked Kessler & Co., Limited, Exhibit T
for identification.

Q. I show you a letter press copy in the same 1430
book brought here by the same official—a paper
which purports to be a letter press copy sent by
Kessler & Company to Manchester, under date of
August 23, 1907, and ask you if you know the sig-
nature? A. Yes, Mr. Alfred Kessler.

Q. "Kessler & Co." is signed by Alfred Kessler?
A. Yes.

Q. You recognize it? A. Yes.

Q. You are familiar with the handwriting? A.
Yes.

Mr. Elkus: I offer it in evidence. It reads as
follows:

"No. 174.

1421

AUG. 23rd, 1907.

MESSRS. KESSLER & Co., Ltd.,

Manchester.

Dear Sirs:

Confirming our last respects of No. 173,
we beg to acknowledge receipt of your favor
of the 13th inst., contents of which are duly
noticed. We beg to advise having received
\$418.69 from W. H. Lewis & Co., N. Y., at
488½ equal to £85:14:2 \$29.89 from F. W.
& E. Dammamm, Baltimore, at 488½ £6:2:5,

1432 for which amount please debit us for account of Bradford.

We remain, dear sirs,

Yours truly,

Will you be kind enough to obtain some information for us in regard to the standing and credit of Mr. M. S. Manuel, fruit exporter of Smyrna, Turkey. Thanks in advance.

Yours truly,

KESSLER & Co."

1433 Same objection, same ruling. Exception. Marked Kessler & Co., Limited, Exhibit U for identification.

AFTER RECESS.

Mr. Elkus: I offer in evidence Kessler & Co., Limited, Exhibit I for identification, and read it as follows:

"MANCHESTER, 4th Sept., 1907.

MESSRS. KESSLER & Co.,

New York.

DEAR SIRs:

1434 We confirm our respects of 4th inst. and your favor No. 176 since come forward.

We credit you in B A val. 6th inst. with £8:19:2, bill on Oliver Machinery Co., M'chester, in conformity with your advices.

As against your drafts on us, which have now been accepted by us, we debit you in B A with £20,000, value 6th November 18%).

Isaac Sowden & Sons. We are afraid there will be difficulty as to the payment, as they now say they will not have the goods owing to their being imperfect. However,

Mr. Greesley (Milne's agent here) we understand is writing to Mr. Milne about the matter, and we await further instructions.

Yours faithfully,

KESSLER & CO. LIMITED,

H. KESSLER, Director.

(Stamped: "Kessler & Co.,

Received

Sep. 13, 1907

Ans'd 17 M)"

Same objection. Same ruling. Exception.

Mr. Elkus: I offer in evidence Exhibit H for identification, which is as follows:

"No. 189 SEPT. 17, 1907.

MESSRS. KESSLER & CO. LTD.

Manchester.

DEAR SIRS:

We confirm our respects of No. 188 and are in receipt of your favor of the 7th inst. (arrived 2.50 P. M. 13th), contents of which are duly noted.

As soon as we hear from Mr. Milne in the matter of Isaac Sowden & Sons, we will let you know.

We beg to advise having received check¹⁴³⁷ for \$29.77 from F. W. & E. Dammamm, for which please debit us at 286¼ with £6:2:6 in favor of Bradford. Please draw on Messrs. Glyn, Mills, Currie & Company for our account on September 26th, £2500. On September 28th £10,000,

and oblige, dear sirs,

Yours faithfully,

ALBT. KESSLER."

Same objection. Same ruling. Exception.

1438 REDIRECT-EXAMINATION BY MR. LARKIN:

Q. You remember being examined before Commissioner Alexander, do you not? A. Yes, I do.

Q. Do you remember that you referred to this letter of the 25th of October, which has been put in evidence here? A. Yes.

Q. Do you remember that I asked you this question: "Do you know what you said in that private letter?" and your answer was, "Well, I just said that I had, by the advice of a lawyer, taken all the securities and put them in a separate box." Now, will you please look at that letter and show me where anything was said in that letter about taking
1439 the advice of a lawyer? A. It was said in the memo., however.

Q. Just look at the letter (the witness does so).

Mr. Elkus: When was he examined?

Mr. Larkin: He was examined on the 14th of November.

The Witness (reading): "You will see from my memo. of yesterday."

Q. Read the letter. "It is strange I anticipated on your ideas—as you will see from my memo. of yesterday." Now, that memo. of yesterday you haven't got with you? A. No; I haven't got with me.

1440 Q. And you haven't a copy? A. No.

Q. Do you remember my asking you the question: "Can you get a copy of that letter and send it to us?" And you said, "I don't think I can"? A. Yes.

Q. You haven't any objection to getting that letter, have you? A. No.

Q. Then why did you say that you couldn't get it? (No answer.)

Q. Now, Mr. Kessler, how much did you get for accepting these drafts? A. Commission? It states always in the letter—one-quarter, one-eighth, three-

sixteenths—just according to the length of the 1441 drafts.

By Mr. Elkus:

Q. Not $12\frac{1}{2}\%$ —an eighth of one per cent? A. Yes.

By Mr. Larkin:

Q. You stated that you made this reference to Lloyds' Bank at the request of Alfred Kessler, where you wrote asking if they could not borrow something against Cripple Creek. Do you remember that? A. Yes.

Q. Didn't it occur to you to ask Alfred Kessler 1442 why he couldn't borrow it here? A. No.

Q. Or why he needed to borrow money? A. No.

Q. You didn't ask him that? A. No.

Q. You testified that you heard the Flinsch cable talked about so far as it related to borrowing \$200,000? A. I heard that.

Q. Didn't it occur to you to ask Alfred why he needed \$200,000? A. No.

Q. You didn't ask him that? A. No.

Q. You testified that you heard something said about going to see Mr. Morgan. Did you ask Mr. Kessler why he wanted to go to see Mr. Morgan? A. No, I did not.

Q. When you saw bad news in the papers, didn't 1443 you ever speak to anybody in the office about it—about the bad news? A. Talked about the general news in the Street.

Q. You knew at the time that banks and trust companies were failing right all around, didn't you? A. I saw it in the papers.

Mr. Larkin: Please let me have the agreement of October 30th you have offered in evidence this morning.

Agreements produced by Mr. McLaughlin and handed to Mr. Larkin.

1444 Q. Now, Mr. Kessler, just look at these two papers please? (Witness does so.)

Q. You remember those agreements, don't you?

A. Yes.

Q. Those agreements were prepared by your attorney, Mr. McLaughlin, weren't they? A. Yes.

Q. And after consultation with you—is that right? A. No; Mr. Sprague prepared them.

By the Special Commissioner:

Q. After consultation with you? A. There was no special consultation. Mr. Sprague prepared them himself. He said they were necessary.

1445

By Mr. Larkin:

Q. You had some conversation, as you call it, with Mr. Sprague, didn't you? A. No.

Q. Did he prepare those of his own motion? A. I just told him that I had given power to the gentleman, and then he said, I had better prepare an agreement.

Q. Did you read those papers before you signed them? A. I did, yes.

Q. Did you read this language in the agreement: "Whereas the said firm of Kessler & Co., of No. 54 Wall Street, Manhattan, New York City, have deposited with Kessler & Co., Limited, of Manchester, England, certain securities, as collateral to the said indebtedness." Do you remember reading that? A. I read it.

1446

Q. Was that the fact?

Mr. Elkus: I object to that. The objection I make is this—that this paper was introduced solely for the purpose of showing the power which the persons named therein had from Kessler & Co. of Manchester, to deal with those stocks, and they expressly objected to the papers and it was excluded upon every other ground but that especially

as to the recitals of facts therein. Now, if they 1447
want to put it all in evidence——

The Special Commissioner: They are simply refreshing his memory as to the fact—they simply call his attention to what is in there and then ask him if that is the fact.

Mr. Elkus: I ask that this whole paper go in evidence for every fact that is in it if they cross-examine about it. Then, there is a legal question involved. It is incompetent and calls for his legal conclusion.

Objection overruled. Exception.

By the Special Commissioner:

1448

Q. What was the fact? A. I considered the securities our property.

Q. I asked you what was the fact? A. It is a legal question that I really could not answer.

By Mr. Larkin:

Q. Is that the best answer you can give me? A. I considered them our property.

Q. I call your attention to a paper dated the 25th of October, 1907, marked for identification Exhibit I, and ask you to please look at it? (Witness does so.)

1449

Q. You have now looked at the paper, have you not? A. Yes.

Q. I call your attention to this language contained in this instrument: "Whereas the said firm of Kessler & Co., No. 54 Wall Street, Manhattan, New York City, have deposited with Kessler & Company, Limited, of Manchester, England, certain securities as collateral to the said indebtedness," which said securities are held in the name of Kessler & Co., Limited. You read that paper before you signed it? A. Yes.

Q. You read that language? A. Yes.

1450 Q. Was that the fact? A. Yes.

Q. Do you want to change your answer to the same effect in reply to the questions I have put to you regarding the instrument dated October 30th?

A. I didn't understand the question.

Q. You don't understand the question I put to you? A. No.

Mr. Elkus: I move that the answers be stricken out.

Objection overruled. Exception.

Q. Now, Mr. Kessler, where were these papers signed? These papers were signed at the office of
1451 Kessler & Co.

Q. On the 25th of October? A. On the day they are dated, yes, sir.

Q. I am asking you whether the paper which is dated October 25th was signed in the office of Kessler & Co. of New York? A. Yes.

Q. Did Mr. Sprague come down there with this paper? A. No, I took them myself.

Q. You took them to Mr. Sprague's office, did you? A. Yes.

Q. And they were there signed? A. Yes.

Q. Now, where was the paper of October 30th signed? A. Just let me see (witness looks at
1452 paper). I think at the same place. Yes, it was signed there too.

Q. Now, was that paper of October 25th signed before you took the securities from the safe deposit vault? A. No, it was signed after.

Q. Signed after you took the securities from the safe deposit vault? A. Signed after.

Q. I understand you to state that you never went to see Mr. McLaughlin or Mr. Sprague or any member of that firm prior to the 24th of October, 1907? A. I did not.

Q. And you arrived here, I think, on the 4th of October? A. I arrived here on the 4th of October.

Q. In your testimony this morning you referred 1453
to a letter which had in it "Joint account." What
was the joint account?

Mr. Elkus: If you are going to ask about the letters, I make the point that they are admissible in evidence. You cannot ask about the contents of a letter and pick them out.

The Special Commissioner: Yes, you can. You can always refresh his recollection by anything that will refresh it.

The Witness: The joint account was a special account. When we got, perhaps, payments made in Manchester for account of somebody here, then we booked it over the joint account, and then the people here would pay it out to a certain person in New York, or wherever it might be, and we credited it for the money which we had received in Manchester. 1454

Q. Was that transaction different from any other transaction? A. Quite different, quite separate from all other transactions.

Q. The transaction that you refer to is that you paid money for the account of Kessler & Company of New York? A. No, that is different. Suppose a man came in Manchester and said, "Will you please issue a draft on New York drawn to the order of somebody in London for fifty pounds." They would pay us the fifty pounds and we credited the fifty pounds on the joint account, and we issued that draft on the New York house, who would send to the correspondent of the party who sent us the money, and then when the New York house paid our draft they credited us over the joint account—the bookkeeping name for the account to keep— 1455

Q. The other account was called a banking account? A. Yes.

Q. Do you know what the name of the joint account was in the New York house? A. I should

1456 say it is "Joint account," because it is mentioned in the letters.

By Mr. Elkus:

Q. Is it always balanced up? A. It is always balanced up. It is only a few dollars, only small amounts involved.

By Mr. Larkin:

Q. Now, you stated, I think, that Bertie Kessler and Nestle dined with you once or twice? A. Yes.

Q. They dined frequently with you? A. No.

Q. Didn't they dine with you one night when I
1457 called on you?

Mr. Elkus: What night was that?

Q. They dined with you from time to time while—— A. No, they dined with me twice.

Q. I think you said this morning that you went to see Mr. McLaughlin in regard to changing the partnership? A. No, I didn't say that.

Q. Tell us again, Mr. Kessler, what it was you said about changing the partnership? A. Well, I don't think I said anything, except, that in view of the change of the partnership, I came to see Mr. Sprague again—something I can't really remember.

Q. Changing of the partnership? A. Well, Mr.
1458 Gillette might be going out.

Q. Might be going out? A. Yes, sir.

Q. Who told you that Gillette was going out?
A. He intended going out the previous year.

Q. Who told you that Gillette was going out?
A. I don't know. You asked me a question and I tell you.

Q. Who told you that Gillette was going out and that there would be a change in the partnership?
A. That Mr. Gillette was perhaps going out.

Q. Who told you that Mr. Gillette was going out and that there would be a change in the partner-

ship? A. Well, we heard that a previous year, that ¹⁴⁵⁹ he might be going out at the end of the year.

Q. Won't you answer my question? Who told you that Gillette was going out? A. Nobody told me.

Q. And, although nobody told you, you went to consult Mr. Sprague and Mr. McLaughlin about a change in the partnership? A. I just mentioned the matter that it might be the case.

Q. Now, what was it that you said to him? A. I can't remember what I said.

Q. How are you interested in the Kessler change in the partnership? A. On account of the executors' account.

Q. Because the executors had a claim against him? A. Against Kessler & Company. ¹⁴⁶⁰

Q. Now, Mr. Alfred Kessler says they didn't have a claim against Kessler & Company, that they had a claim against him personally. What is the fact? A. They had a claim against Kessler & Company.

Q. You have been here at this reference from day to day as it has proceeded, haven't you? A. Yes.

Q. Don't you remember that Mr. Alfred Kessler said he borrowed some money from his father's estate and put it in the firm, and that Flinsch gave him a note for a part of it?

Mr. Elkus: I object to it as immaterial, whether ¹⁴⁶¹ he heard Alfred Kessler testify to that or not.

Objection sustained. Exception.

Q. Did you know that—— You knew in some way or other that Gillette was going to retire from the firm? A. No, how could I?

Q. You had some information on the subject, didn't you? A. I was under the impression that he might be.

Q. Did you know that there was any friction between him and his partners? A. I don't know.

1462 Mr. Elkus: I object to that as immaterial, whether he heard there was friction or not. It is immaterial.

Objection overruled. Exception.

Q. You went to see Mr. McLaughlin because you heard there might be some change in the firm of Kessler & Company of New York at the end of the year? A. I didn't hear—because I anticipated perhaps there might be some.

Q. When you were here, I suppose, Mr. Kessler—did you draw on the New York house from time to time personally? A. I did, yes.

1463 Q. And you are indebted now to the New York house in any sum? A. I am not indebted to the New York house for anything.

Q. The drafts which you made upon them—that cash you have since liquidated? A. They have to be debited to Kessler & Company of Manchester.

Q. How much money did you draw, do you know? A. About eight hundred dollars, I believe, but I am not quite certain about that.

Q. Mightn't it be between twelve or fifteen hundred dollars? A. I can't tell you exactly. Twelve hundred dollars I drew.

1464 Q. You don't claim to owe that to Kessler & Company of New York? A. I do not. It must be debited to Kessler & Company in Manchester.

By the Special Commissioner:

Q. When was the last draft? A. The last draft was on the 29th, I believe, the 29th of October.

Q. The 29th was the last? A. Yes.

Q. How much was that? A. That was five hundred dollars.

RECROSS-EXAMINATION BY MR. ELKUS:

Q. Just keep that book out and point out the amounts that you drew. A. On the 5th of October,

one hundred dollars; on the 7th, four hundred dol- 1465
lars; this, I believe, is the 25th, two hundred dol-
lars, and then the 29th, five hundred dollars, just
before I went away.

Q. Those were for your personal expenses while
you were here? A. Those were for my personal ex-
penses while I was here and the credit was opened
to me from Manchester.

Q. From Manchester? A. From Manchester.

Q. And that was charged to the Manchester
house? A. I don't know how they booked it, but
it had to be charged.

Q. Did you give them a receipt? A. No, they
gave me a check book, a small check book; all I 1466
wanted.

Q. Was any limit placed on your drawings? A.
None whatsoever.

Q. Now, Mr. Kessler, you were asked with ref-
erence to whether Alfred—— Did it ever occur to
you why Alfred Kessler needed money when he
asked you to find out if you could borrow against
securities? You knew, as a matter of fact, didn't
you, that Wall Street bankers and brokers are bor-
rowing on securities all the time? A. Yes.

Q. That is nothing unusual? A. That is nothing
unusual.

Q. Is it anything unusual to borrow in London? 1467
A. No; it is regularly done.

Q. Now in reference to getting this letter here.
Do you know how this letter was brought to
America—October 25th? A. I believe it was in
answer to Mr. Larkin's wish that it was brought
here.

Q. Cabled for? A. Cabled for.

Q. Were you asked to bring any other letter? A.
I was not asked to bring this.

Q. Have you any objection to producing here any
other letter that you wrote that may be in existence?
A. No.

1468 Q. You were asked some questions about this agreement, Exhibit I, whether you read certain parts of it. I want to ask you whether you read this part of it: "Whereas, Alfred Kessler, Rudolph Flinsch and William K. Gillette, individually and as co-partners composing the firm of Kessler & Company, bankers and brokers, at No. 54 Wall Street, Manhattan, New York City, are justly and truly indebted to Kessler & Company, Limited, of Manchester, England, in the sum of \$500,000 and upwards." Did you read that? A. Yes.

Q. Was that the fact?

Mr. Larkin: I object to that.

1469

Objection sustained. Exception.

Mr. Larkin: I think, Mr. Referee, that, in regard to calling Bertie Kessler, I shall not do so in behalf of the Receiver, and I give notice to the other side that, if they want to call him, they had better do so now.

Mr. Sprague: You mean you have no objection to his going?

M. Larkin: I have no objection to his going if you do not, no. He can go, so far as I am concerned.

1470 ALBERT F. H. KESSLER (recalled by Mr. Elkus):

By Mr. Elkus:

Q. You have been in attendance at the reference under subpoena? A. Yes, sir.

Q. Who subpoenaed you? Have you got the subpoena? A. The Receiver subpoenaed me—in the name of the Receiver.

By Mr. Larkin:

Q. When were you subpoenaed? A. On Friday afternoon.

Q. What day of the month? A. The 6th. 1471

Q. Were you subpoenaed down in the office? A.
Down in the office of Kessler & Company.

RUDOLF E. F. FLINSCH, a witness called on behalf of the Receiver, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. LARKIN:

Q. Mr. Flinsch, you were a member of the firm of Kessler & Company? A. Yes, sir.

Q. How long have you been a member of that firm? A. Since January 1st, 1897.

Q. And that firm is composed of yourself and 1472
Albert Kessler and William N. Gillett, wasn't it?
A. Yes, sir.

Q. And your membership in that firm continued down to the time of the assignment, didn't it? A.
Yes, sir.

Q. Now, I wish you would please state, if you will, what the nature of the business of Kessler & Company of New York was—carried on—the general nature of their business? A. They were foreign bankers.

Q. With foreign bankers? A. They were foreign bankers.

Q. You were foreign bankers? A. Yes, sir. 1473

Q. That is to say—will you please explain that answer a little bit more fully as to what you mean?

Mr. Elkus: Ask him what business they did.

Q. Now, please explain what you mean by your answer? A. Bought and sold foreign exchange. We made loans. We bought and sold stocks and bonds on the Stock Exchange. We bought and sold them outside. We advanced moneys in a commercial way—drygoods and so on. We opened letters of credit for importation of goods. We issued travelers' letters of credit. We financed various

1474 kinds of businesses, and we borrowed and loaned money.

Q. Now, how much cash did you put into the firm when it was organized? A. Well, the books would show that.

Q. How much cash did you put into the firm when it was organized?

Mr. Elkus: In 1897?

Mr. Larkin: Yes, sir.

Q. When the existing partnership was formed, which you say continued down to the assignment, how much cash did you put into that partnership?

1475 A. \$400,000.

Q. Was that cash or was it an asset—claim—which you were carrying over from a former firm?

A. Yes.

Q. It wasn't cash, was it? A. It is just as you look upon it. The balance sheet showed that.

Q. I am not speaking about the balance sheet. I am not asking you about the balance sheet. I want to know what cash you put into the concern when the present partnership was organized? A. \$400,000.

Q. You state that you put in \$400,000 in cash, do you? A. I said I put in \$400,000.

1476 Q. I am asking you whether you put in \$400,000 in cash—not securities or claims? A. Well, I cannot answer that question.

Q. Now, as a matter of fact, you don't know how much cash you put into the concern when it was organized, do you?

Mr. Elkus: I object to that question, because it calls for a conclusion of the witness, and not a fact. He may consider securities the equivalent of cash.

The Witness: You want to know how much money I put in on the 5th of January, 1902?

Mr. Elkus: You said 1897, didn't you?

Q. When was the present partnership formed? 1477

A. January 1st, 1902.

Q. When was the partnership formed prior to that? A. January 1st, 1897.

Q. Had you been in partnership before that? A. No, sir. I went in January 1st, 1897.

Q. Now, on January 1st, 1897, how much cash did you put in?

Mr. Elkus: That is objected to as too remote.

Q. That is—it wasn't a different firm in 1897?

A. It wasn't the present partnership, Mr. Larkin.

By the Special Commissioner:

1478

Q. When did the present partnership commence?

A. January 1st, 1902.

By Mr. Larkin:

Q. Who were the members of the first partnership? A. Mr. William Kessler, Mr. Alfred Kessler and myself.

Q. And Mr. Gillett was not a member of that firm? A. No.

Q. When did Mr. Gillett come in? A. January 1st, 1902.

Q. Now, the capital of the firm organized January 1st, 1902 represented the assets of the former firm, 1479 so far as you are concerned? A. Yes, sir.

By Mr. Elkus:

Q. So far as your interest was concerned? A. Yes.

By Mr. Larkin:

Q. And you didn't put in anything other than the interest which you had in the prior firm, did you? A. At that time? Didn't put in any new capital.

1480 Q. And Alfred Kessler the same way, wasn't it —what they had in the old firm? A. Excepting what we borrowed from him. No, what Mr. Kessler borrowed from the estate of William Kessler in Manchester.

Q. You mean Alfred Kessler borrowed some money from the Kessler estate in Manchester? A. Yes, sir.

Q. And put that in? A. I borrowed some from him.

Q. You borrowed some from Alfred? A. Yes, and I put that in.

1481 Q. With the exception of that, neither you nor Alfred put in any additional cash into the concern? A. No, sir.

Q. And therefore the amount of your contribution to the capital of the present concern depended entirely upon the amount realized out of the old firm in liquidation?

Mr. Elkus: I object to that. That is not a fact but calls for a conclusion. The old firm was not liquidated except that one partner had got out and formed a new partnership.

The Special Commissioner: You can ask him what the results of the liquidation were.

1482 Q. Your contribution to the capital of the present firm resulted from the liquidation of the prior firm?

Mr. Elkus: I object to that. The prior firm didn't liquidate.

By the Special Commissioner:

Q. What did you do in that regard? A. Mr. Gillette put in his money—\$300,000, and William Kessler was paid out.

Q. You had to ascertain what his interest was? A. Certainly, sir, by a balance.

Q. And, to do that, you had to ascertain what the interest of everybody was? A. Yes.

Q. And that was done after his death? A. Yes. 1483

Q. That was done by the surviving members? A.

Yes.

Q. And that is called "in liquidation"? A. Yes, sir.

Q. Was that result put upon your books? A. Yes, it shows in the balance sheets.

Q. Of what year? When had you completed the liquidation so as to ascertain the interest? A. About in March, 1902, the balance sheet was drawn.

Q. And when did William Kessler die? A. In February, 1901.

Q. And by March, 1902, his interest had been ascertained and the affairs of the old firm liquidated? A. Yes, sir. 1484

By Mr. Elkus:

Q. When was the balance sheet as of—what date? A. As of, well, either December 31, 1901, or January 1st, 1902.

Q. The end of the partnership? A. The end of the former partnership.

By Mr. Larkin:

Q. Do you remember now what the interest of William Kessler was—what the proportion was?

Mr. Elkus: I object to that as immaterial. 1485

Objection overruled. Exception.

The Witness: I think about \$300,000—not more.

Q. You didn't quite understand my question. What was the proportion which William Kessler held in that firm—one-half, three-fifths or what?

Mr. Elkus: The percentage of profits that he drew.

The Witness: You mean the capital or the—

Q. The contribution of capital. How did his contribution compare with yours and Alfred Kessler?

1486 Mr. Elkus: Objection.

Objection overruled. Exception.

The Witness: Mr. Gillett had paid in his \$300,000 in the end of 1901.

Q. So you took Gillett's \$300,000 and paid out the Kessler executors? A. Excepting the amount that was borrowed by Mr. Alfred Kessler. That is my recollection of it.

Q. You paid out the Kessler executors and then \$300,000 for their interest, and subsequently borrowed a certain sum of money through Alfred Kessler? A. Yes, sir, that is correct.

1487 Q. Now, how much did you borrow from the Kessler executors? A. I think \$52,000.

Q. How much of that \$52,000 did you obligate yourself for? A. \$52,000.

By the Special Commissioner:

Q. You jointly and severally, both of you, were liable for the whole amount? A. No, I was liable for \$52,000; Alfred was liable for a different amount.

Q. How much was that? A. I think that must have been \$38,000, or around there.

By Mr. Larkin:

1488

Q. So that you and Alfred borrowed about \$90,000 from the executors of the Kessler estate? A. I think so.

Q. Now, you say Gillett put in \$300,000. Do you say that Gillett put in \$300,000 in cash? A. Yes, sir.

Q. In cash or securities? A. Cash.

Q. And that \$300,000, as you say, was paid over to the Kessler executors? A. No, sir.

Q. Except the amount that was represented—his borrowings? A. I think so.

Q. Now, what was the proportion which William

Kessler was entitled to under that partnership? 1489
Was he entitled to a half or a quarter, or what?

Same objection. Same ruling. Exception.

By the Special Commissioner:

Q. What was his share in the profits and his liability for losses? You may answer that. A. In the previous partnership?

Q. Yes? A. 30 per cent.

By Mr. Larkin:

Q. Now, the capital, then, of your firm, of the new firm as organized, consisted, didn't it, of the assets which remained over from the old firm, plus \$90,000 that you borrowed from the Kessler executors? A. And the amount put in by Mr. Gillett. 1490

Q. The amount put in by Mr. Gillett was immediately withdrawn to put off the Kesslers, wasn't it?

Mr. Elkus: I object to that.

Objection sustained.

Q. Now, after that time, Mr. Flinsch, there was no other cash contributed either by you or Alfred Kessler or by Gillett? A. No, sir.

Q. Right down to the very end? A. Nothing else. 1491

Q. Won't you state, please, Mr. Flinsch, what the general conditions were in this city about June—May and June of 1907—about the time of your departure for Europe?

Mr. Elkus: I object to that; incompetent, immaterial and irrelevant, and too vague and indefinite.

Objection overruled. Exception.

The Witness: What conditions, Mr. Larkin—general conditions?

Q. General financial conditions in this city?

1492 The Special Commissioner: Financial and business conditions in this city.

The Witness: Well, I think there had been a slowing up of business generally throughout the country. There was a decided slackening in the investment business. It was hard to sell any securities.

Q. What can you say about the values of securities which were quoted on the Stock Exchange—Wall street securities?

Same objection. Same ruling. Exception.

A. They had declined considerably since the beginning of the year or longer.

1493 Q. Any securities of the very first class had declined, hadn't they? A. Undoubtedly.

Q. Some of them as much as a hundred points? A. Not of the first class securities.

Q. How about Great Northern Preferred? A. Hadn't declined that many points.

Q. Fifty? A. Since when? Since the beginning of the year?

Q. Yes? A. I don't think so.

Q. Well, how about Reading?

Same objection. Same ruling. Exception.

A. I don't know.

1494 Q. Don't you know, Mr. Flinsch, that a great many of the best securities have declined from fifty to a hundred points between, say, October, 1906, and June, 1907, when you left?

Same objection. Same ruling. Exception.

A. I know there had been a very considerable falling off in the value of securities.

Q. And it is a part of your business to watch the value of the securities? A. Of my personal business? Q. No, of the business of Kessler & Company, when you were in business in the summer—A. As far as they themselves or their customers were concerned, I should think so, yes.

Q. What was your special business in Kessler & 1495
Company? A. I had to do practically all the out-
side work. I had to attend to such matters as Crip-
ple Creek Central Railway Company, United States
Reduction & Refining Company, certain transac-
tions with the Daimler Manufacturing Company;
some advances that we made to a concern called the
Rotograph Company. The Beaver Land & Irriga-
tion Company, I had to do the work in connection
with that. I had to do the traveling in this coun-
try and abroad, most of it, and I had to attend to
such things as came up from time to time that Mr.
Kessler wanted me to attend to.

Q. The nature of the business, then, had to do 1496
largely, then, with what may be called syndicate
operations? A. To a large extent, yes.

Q. Now, when was it that you left for abroad?
A. June 15th, 1907.

Q. Did you go on business? A. No, sir, not pri-
marily.

Q. Well, what was your primary reason for going
abroad? A. I hadn't been very well before.

Q. You had been ill in October or the fall pre-
vious? A. In the fall and winter.

Q. Fall and winter? A. Of 1906, yes, sir, and
1907.

Q. And you were at your office during the re- 1497
mainder of the winter and down to June? A. I
came back in February, and, excepting for about
the three weeks' trip to Colorado in April and May,
I was there until the beginning of June.

Q. Now, when did you arrive on the other side?
A. The 25th of June.

Q. Where did you arrive? A. In London.

Q. Did you see anybody on business matters on
your arrival in London? A. I did.

Q. You didn't wait long to recuperate, then? A.
No, I proceeded to Frankfort.

Q. Who did you see on business in London?

1498 Mr. Elkus: That is objected to as immaterial in this issue, unless it was Kessler & Company, Limited, of Manchester.

Objection overruled. Exception.

A. The Union Discount Company, Messrs. Glynn, Mills, Currie & Company, The German Bank of London, Messrs. Schunck & Company, Messrs. Reuffer & Sons, Messrs. Cunliffe Brothers—I think that was all.

Q. How long did you stay in London? A. A week, not quite a week. I beg your pardon, about four days.

Q. Did you see the Anglo-Foreign Banking Company? A. Yes, I saw them, too.

Q. You forgot that, did you? A. I didn't think of it. I think that must be in my letters, Mr. Larkin.

Q. Unfortunately, your letters cannot be found, Mr. Flinsch. A. I beg your pardon.

Q. We cannot find your file of letters here—letters which you wrote to the firm. A. I beg your pardon.

Q. Have you seen those letters? A. No, I haven't, but I think they can be found.

Q. Well, I wish you would find them. Do you think you can find them? A. Well, I think they were on hand. I had no idea they were not on hand.

Q. I regret to say we cannot find your letters, Mr. Flinsch. A. I wasn't here.

Q. I know you weren't.

By Mr. Elkus:

Q. When did you come back from Europe? A. November 5th, 1907.

By Mr. Larkin:

Q. Now, take up the Union Discount Company, if you please. A. Yes, sir.

Q. What was it—what business were you doing 1501
with them? A. Discount business.

Mr. Elkus: Generally speaking, do you mean?

Mr. Larkin: Yes. I want to find the nature of
their business.

Q. You were doing a general discount business?

A. Yes, sir.

Q. Now, what was the nature of the discount
business you were doing with the Union Discount
Company?

Mr. Elkus: I object to it as irrelevant and imma-
terial, nothing to do with the issues in this pro-
ceeding. 1502

Objection overruled. Exception.

A. We remitted to them such bills of exchange
as we bought in the market here.

Q. As you buy in the market here? A. As we
bought in the exchange market here, and they dis-
counted them at a certain rate of interest, and we
drew upon them for their approximate equivalent
of such remittances. The remittances were usually
so-called long paper.

Q. While you were there, did you ask them any-
thing about making long drawings on them?

Mr. Elkus: That is objected to—conversation be- 1503
tween this witness and some third person, not in
the presence of Kessler & Company, Limited, or
anybody representing them; incompetent, imma-
terial and irrelevant.

Objection overruled. Exception.

A. I did not.

Q. According to your statement, as I understand
it, in order to draw on these gentlemen, you first
had to buy bills here? A. Yes, sir.

Q. And that operation, of course, required you to
put up cash to buy the bills, didn't it? A. Yes, sir.

1504 Q. And by getting the privilege from any one of these banks in London which you have mentioned here to draw on them, long drawings, you could sell such drafts and realize cash from them, couldn't you? A. Yes, sir.

Q. So that, in one case, you tied up cash, and in the other case you got cash—is that correct? A. That is correct.

Q. So it was in your mind, wasn't it, to endeavor to increase your long drawings with these different people in London? A. No, sir.

Mr. Elkus: I object to it, doesn't make any difference to us what was in his mind.

1505 Objection overruled. Exception.

Q. You have received, Mr. Flinsch, while you were abroad, letters from Kessler & Company and from Alfred Kessler here in New York? A. Yes, sir.

Q. Where are those letters? A. The letters that I received?

Q. Yes? A. Well, Mr. Alfred Kessler has given you his copy book.

Q. Where are the letters that you received from Alfred Kessler or Kessler & Company, of New York? A. I think Mr. Seymour has them.

1506 Q. When did you give them to Mr. Seymour? A. Four or five days ago.

Q. Do you know whether these letters that you have referred to included cables which you received? A. There were cables, too.

Q. There were cables included in this? A. Yes.

Q. How many letters were there that you turned over to Mr. Seymour? A. Eight or ten; all I got from Mr. Kessler.

Q. And how many cables did you turn over? A. Well, fifteen or twenty or more.

Q. Since you came back, have you made any efforts to find any of the letters which you sent to

Kessler & Company, of New York, while abroad? 1507

A. No, sir.

Q. You say you called on the Anglo-Foreign Banking Company, did you? A. Yes, sir.

Q. Do you remember the time you called on them? A. Yes, sir.

Q. When was it? A. During my stay in London—the end of June.

Q. Did you ask them to increase the amount of the house's drawings upon them?

Same objection. Same ruling. Exception.

A. No, sir.

Q. Did you endeavor to make any arrangement with them whereby you could secure more cash for your use in New York? A. No, sir. 1508

Q. What was the nature of the business that you had to do with the Anglo-Foreign Banking Company?

Mr. Elkus: Objected to as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. Discounting business and their remitting to us time bills, for which we accepted here.

Q. Did you have any right to draw on the Anglo-Foreign Banking Company at all? A. Yes, we had drawn on them. 1509

Q. What was the amount of your right to draw or to what extent? A. I think about 25,000 pounds.

Q. At the time that you were there, did they say anything to you about putting up additional margins against your drawings?

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. They showed me a letter that they had written to the firm here, asking for additional collateral. We did not put up additional collateral.

1510 Q. Well, how do you know that you did not put up additional collateral? A. Because I arranged with them not to put up any additional collateral.

Q. And because you arranged with them to that effect, you think, you argue, that no additional collateral was put up. Is that the basis of your statement? A. Yes, sir.

Q. You made some arrangement, didn't you, with some other institution in Germany, where you thought you would not have to put up any additional collateral?

Same objection. Same ruling. Exception.

1511 A. Not that I remember.

Q. You don't remember? A. No.

Q. I will see if I can refresh your recollection. Do you remember having to do with the Schweizerischer Verein? A. Yes, sir. They are not in Germany.

Q. Where are they. A. Switzerland.

Q. Did you make an arrangement with them that they should not ask for more margin?

Same objection. Same ruling. Exception.

A. They did not ask for more margin.

Q. What did they ask for? A. For nothing.

Q. Did they ask you to take up your drawings?

1512 A. No, sir.

Q. Did the Anglo-Foreign Banking Company ask you to take up your loan?

Same objection. Same ruling. Exception.

A. No, sir.

Q. Did you have a loan with them? A. A long drawing, you mean?

Q. Yes? A. Yes, sir.

Q. Have you seen any private letters that have passed between the Anglo-Foreign Banking Company and Kessler & Company since your return?

Mr. Elkus: I object to that as incompetent, imma- 1513
terial and irrelevant and not the best evidence.

Objection overruled. Exception.

A. No, sir.

Q. What was the object of your seeing the Union
Discount Company? Why did you see them? A.
I always went to see them. I knew them personally
very well.

Q. You had no special object in seeing them? A.
No, sir.

Q. You didn't ask for any new business from
them? A. No.

Q. You saw Glynn, Mills, Currie & Company? A. 1514
Yes, sir.

Q. What arrangement did you make with them?

Same objection. Same ruling. Exception.

A. No arrangement.

Q. Did you ask them to increase your right to
draw on them? A. No, sir.

Q. Did you have any business talk with them at
all? A. No, sir.

Q. And it was purely a personal visit to them, as
it was to the Discount Company? A. Yes, sir.

Q. Who did you see at Glynn, Mills, Currie &
Company? A. I think it was Mr. Mills and Lord
—— I can't tell the name now. 1515

Q. Did Glynn, Mills, Currie & Company ask for
additional collateral? A. No, sir.

Q. Did they ask you to reduce your drawings? A.
No, sir.

Q. Did the Union Discount Company ask you to
reduce your drawings? A. We did not draw on
them.

Q. At the German Bank of London, who did you
see there? A. I forget the name.

Q. What was the nature of your business with the
German Bank of London?

Same objection. Same ruling. Exception.

1516 A. We had advanced, I believe, on some dry goods accounts or on the Orleans County Quarry bonds with them—I forget which it was—and had financed it by long drawings on the German Bank of London. I am not sure about that.

Q. Well, why did you go to see them in London?

A. Because they were the successors to old friends of ours—Hardy Nathan & Company, whom they had taken over in the beginning of the year. They had bought the business of Hardy Nathan & Company at the beginning of the year.

Q. And do you know now how much you have drawn against the German Bank of London? A.

1517 I think eight or ten thousand pounds. It was only a small amount.

Q. All against the collateral of the Quarry Company? A. I believe it was that or some other collateral—I forget just what.

Q. Well, did they ask you to give any additional security when you were over there? A. No, sir.

Q. Did they ask you to pay off the drafts when they became due?

Same objection. Same ruling. Exception.

A. I think that had already been arranged before that.

1518 Q. When—during November? A. I think they had written about it, yes.

Q. Asking you to take up——? A. Not to——

Mr. Elkus: Same objection. If it is a letter, the letter is the best evidence.

The Special Commissioner: I will allow it.

A. Not to take the drawings.

Q. Now, this was a business which the prior house had, wasn't it? A. Yes, sir.

Q. And this German Bank of London, having acquired the business, found this among their business relations, didn't they? A. Yes.

Q. And thereupon asked you to take it up? A. 1519
They couldn't raise additional capital.

Mr. Elkus: I object to that, because it was a letter—he is giving the contents of a letter, and it is incompetent, immaterial and irrelevant, anyway.

Objection overruled. Exception.

Q. When you were there did you ask them to reconsider? A. I think so.

Same objection. Same ruling. Exception.

Q. Was there any other business talked with them than you have given? A. I think not.

Q. How about Schunck & Company? A. What do you mean? 1520

Q. What business did you have with Schunck & Company?

Same objection. Same ruling. Exception.

A. We had a similar business.

Q. You drew on them long drafts? A. Yes, sir.

Q. And these long drafts were secured by what collateral? A. At different times, different collateral.

Q. What was the amount of your drawings against Schunck & Company? A. When?

Q. In the time that you were in London—1907? A. Nothing. 1521

Q. Nothing? A. No.

Q. Had you any arrangement with them whereby you could draw long drafts on them?

Same objection. Same ruling. Exception.

A. No, sir.

Q. You had no business relations with Schunck & Company at the time? A. We had no drafts running on them at the time.

Q. What business had you with them? A. Well, we had some of their securities over here and sent them, I suppose, coupons which we cut off.

1522 Q. When did your business relations with Schunck & Company cease? A. I think February or March. You mean the long drawings?

Q. Yes. A. I think February or March.

Q. 1907? A. 1907.

Q. What was the amount of your long drawings with Schunck & Company in February and March, 1907? A. I think about ten thousand pounds.

Q. Where did you place the drawings which you had on Schunck & Company of ten thousand pounds? A. I don't understand you. Replace them?

Q. Yes. A. I don't know.

1523 Q. Who would know? A. I don't know. You mean replace it with anybody abroad?

Q. Yes, with anybody else? A. I don't think we ever replaced it.

Q. They asked you to pay it off and you paid it off? A. Yes, sir. I am speaking to the best of my knowledge, Mr. Larkin, of course.

Q. I think you said you did not ask Schunck & Company to renew your long drawings with them when you were there? A. There were none running at the time.

Q. You didn't ask them to renew it? A. I proposed the business to them, and they were favorably inclined toward it. It was not carried through,
1524 however.

By Mr. Elkus:

Q. You proposed some new business to them? A. I made a suggestion to them.

By Mr. Larkin:

Q. It was not accepted? A. It was accepted by them, but not carried through ultimately.

Q. Did you refuse to carry it through or did they? A. In what way?

Q. You say it was not carried through. Why 1525
didn't you carry it through? A. The arrangement
was made, but the drawing did not go through. It
was not done.

Q. What was the amount of the drawing you
thought you had made with them? A. I think up
to twenty thousand pounds they might be drawn
upon.

Q. And then they changed their minds? A. I
think so.

Q. Well, now, was that arrangement in the shape
of a letter from Schunck & Company, so far as you
know? A. No, sir.

Q. When they changed their minds they would 1526
inform you in writing? A. Of their change of
mind?

Q. Yes. A. Me personally? I don't think so, no.

Q. Why did you say they changed their minds
then? A. Because the business was not carried
through as arranged.

Q. It may have been in the shape of a letter, I
suppose, from Schunck & Company to the New York
house? A. I think not. I think—I don't think they
ever said anything about it until the drafts came
before them.

Q. And then what happened? A. Yes, they did
not accept it and asked for a remittance, which 1527
was cabled at the time.

Q. Do you know the amount of the drafts which
were drawn on them? Twenty thousand pounds,
was it? A. I think eighteen thousand pounds, I
believe.

Q. Do you remember what that was? A. About
the middle of July—about three weeks after I had
been in London.

Q. And afterwards—you had no business with
them since, have you? A. Yes, sir.

Q. After the middle of July—I mean in regard to
long drawings? A. Yes, sir.

1528 Q. And how much long drawings had you with them? A. There was only a long draft on them which they asked us to buy over—I think eight or twelve thousand pounds, which Kessler & Company here bought, I think, in September or October.

Q. How did you know this? A. That is only subsequent information after my return.

Q. How did you get this subsequent information? A. I think Mr. McLean told me.

Mr. Larkin: I move to strike it out.

Mr. Elkus: I object to it being stricken out. You asked it.

Mr. Larkin: I withdraw the objection.

1529 Q. You say that Mr. McLean told you that Schunck asked the New York house to buy twelve thousand pounds in exchange? A. I think that was about it. It may have been somebody else than Mr. McLean, but I believe it was him, and I think that is the amount.

Q. Well, did your house buy twelve thousand pounds in exchange? A. I think so.

Q. You say that because you have been told so by Mr. McLean. A. Yes, sir.

Q. Where did you get the money to buy that twelve thousand pounds of exchange? A. I couldn't answer that question. At the bank, I suppose.

1530

By the Special Commissioner:

Q. You were not here at the time, were you? A. No, we bought exchange all the time.

By Mr. Larkin:

Q. Well, now, what else do you know about Schunck & Company besides the two instances you have referred to—any other business done with them so far as you know? A. Well, I think there were probably coupons collected and remitted for.

Q. Well, I am not interested in the coupons. A. 1531
What else do you want?

Q. Other than the collection of coupons? A. I
couldn't tell it; I don't know.

Q. Now, in regard to Reuffer & Son. What was
your business with them?

Same objection. Same ruling. Exception.

A. We drew long bills on them against the de-
posit of securities.

Q. What was the amount of your long drawings?
What amount had you a right to draw against
them? A. I think about twenty-five or thirty
thousand pounds. The books would show that.

Q. And these drawings were secured by what? 1532
A. By various kinds of collateral.

Q. Did your arrangement continue down to the
assignment? A. Yes, sir.

Q. Do you happen to know what the amount of
your drawings against Reuffer & Sons were at the
time of the assignment? A. You mean subsequent
information?

Q. Your subsequent information?

Mr. Elkus: I object to that as hearsay.

Mr. Larkin: I withdraw the question, then.

Q. You saw Reuffer & Sons, didn't you, in Lon-
don? A. Yes, sir.

Q. You talked business with them, didn't you? 1533
A. Yes, sir.

Q. And did they tell you at that time what the
amount of their drawings was?

Mr. Elkus: I object to that as incompetent, imma-
terial and irrelevant.

Objection overruled. Exception.

A. No, sir.

Q. Had Reuffer & Sons asked you for any addi-
tional collateral when you were there? A. No, sir.

1534 Q. Did you ask them to increase the amount of your long drawings? A. No, sir.

Q. What was it you talked with them about?

Same objection. Same ruling. Exception.

A. General business. One of the partners is a relative of mine—of my wife's. There was nothing especial discussed.

Q. Any special business discussed? A. I think not.

Q. Now, Conliffe Brothers. Did you talk any business with them? A. Yes, sir.

Q. What was the business you had discussed with them?

1535 Same objection. Same ruling. Exception.

A. They inquired about Beaver Land & Irrigation Company, in which we had gone joint account with them.

Q. Did you have any long drawings with them?

A. Yes, sir.

Q. What was the amount of your long drawings?

Mr. Elkus: If you know.

A. I think twenty-five thousand pounds and the equivalent of about \$85,000.

Q. These drawings were secured by Beaver Land bonds? A. The \$85,000 drawing was based upon Beaver Land & Irrigation Company bonds, and the
1536 twenty or twenty-five thousand pounds of the other drawing was secured by Cripple Creek Central stocks.

Q. How long were these drawings—sixty or ninety days? A. Ninety days drawings.

Q. And, as these matured, they had to be renewed, didn't they? A. Yes.

Q. And that was the business you did with the long drawings—as one matured it was renewed? A. Yes, sir.

Q. Unless someone notified you to pay off? A. Yes, sir.

Q. In the case of Cunliffe Brothers, was this arrangement of long drawings continued down to the time of the assignment? A. Yes, sir. 1537

Q. And you had drawn, I think, do you know, for how much? A. For twenty or twenty-five thousand pounds and the equivalent of \$85,000.

Q. How long had this Cunliffe Brothers's arrangement been going on, do you know—for a year or two? A. I think the first draft on the twenty thousand pounds business was drawn on September 12, 1906, and had been renewed from time to time.

Q. And how about the \$85,000? A. The equivalent of that was drawn partly in the beginning or middle of May and April—well, perhaps a month later or so. 1538

By the Special Commissioner:

Q. In 1907? A. Of this year; yes, sir.

By Mr. Larkin:

Q. The Anglo-Foreign Bank—have you stated all you had to do with Cunliffe Brothers? Did you propose any new business with them? A. I did not, no.

Q. Did you ask them in regard to the long drawings, whether they were to be renewed or not? A. No, sir. 1539

Q. So it was really a personal call then, more than— A. No, I think it was partly a business call, because there were some other matters brought up, too.

Q. Well, what were the other matters brought up?

Same objection. Same ruling. Exception.

A. In connection with the United States Reduction and Refining Company.

Q. Was that collateral some of those securities? A. No.

1540 Q. What did you want them to do—buy some of them? A. I personally did not want them to do anything, excepting as a Director of that company.

Q. This Reduction and Refining thing had nothing to do then, with Kessler & Company, of New York? A. No, sir. Well, yes, it had, to a certain extent.

Q. How? A. We were interested in the stock of the Reduction Company.

Q. Did you call to sell some of the stock which you held? A. No, sir.

Q. How were Kessler & Company interested in it? A. In making an arrangement for the Reduction Company with the Stratton Independence Mine, which is owned in London, and of which Lord Chesterfield is the Chairman.

1541

Q. Because of their holdings of the Reduction Company stock? A. I did it partly for that reason and partly because I was a Director of the Reduction Company.

Q. Was there any other business than the Reduction business? A. I think not.

Q. Now, how about the Anglo-Foreign Banking Company? What was your business with them? A. Well, I have told you that already.

1542

Q. The purchase of drafts and the sale to them of the drafts and drawings against them for long drawings—is that right? A. Yes, I think I told you about our long drawings on them.

Q. Was there anything else except that which you spoke of? A. No, sir.

Q. And this Discontes Gesellschaft. What business did you have with them? A. Discounting business, too.

Q. Well, what was the nature of that discounting business? A. The same as the other discounting business with the Union Discount Company, for instance.

Q. That is to say, that you purchased bills here

in New York and you sent those bills to London? 1543

A. Yes, sir.

Q. They were discounted by the Discontes Gesellschaft, and the equivalent you were authorized to draw against here in New York—long drawings?

A. Not on long drawings. Those were generally disposed of by checks or demand drafts.

Q. That arrangement required you to put up cash here in New York? A. Yes, sir. We also had a blank credit for long drawings on the Discontes Gasellschaft.

Q. A blank credit? A. Yes.

Q. You mean by that you had an unlimited right to draw on them? A. Up to a certain amount—I 1544 think three hundred thousand marks.

Q. How much is three hundred thousand marks? A. \$75,000.

Q. Did you draw on them for that amount? A. At that time?

Q. At any time? A. I think so, yes; may have been less.

Q. But subsequently you drew to the limit of your arrangement with them, did you? A. I think at times, yes.

Q. And was there any security for that \$75,000? A. No, that was a blank credit.

Q. Did your drawing continue down to the time 1545 of the assignment? A. I think so.

Q. Do you know whether it was reduced or not? A. I do not.

Q. Did you ask them to increase it? A. No, sir.

Q. Did you ask them about any other business? A. No, sir.

Q. Having this credit of \$75,000, long drawings would put you in funds to buy drafts here in New York? A. Yes, sir.

Q. So that, really, you didn't have to put up any of your own money for the purchase of drafts in

1546 New York unless they exceeded the amount of \$75,000?

Mr. Elkus: I object to it as argumentative and not calling for a fact.

Objection overruled. Exception.

Q. Did you see Kleinworth in London? A. No, sir.

Q. You never dealt with them in London, did you, Mr. Flinsch? A. No, sir.

Q. Does that represent the extent of your transactions with the Discontes Gesellschaft? A. Yes, sir.

Q. You didn't ask them to increase your right to
1547 draw on them? A. No.

Q. And they didn't ask you to put up any margin? A. No. Well, there was nothing put up, anyhow.

Q. And the right to draw on them, you say, was a blank credit to the extent of how much? A. Three hundred thousand marks, \$75,000.

Q. Now, after you left London, where did you go? A. To Frankfort.

Q. How long did you stay in Frankfort? A. About two months.

Q. Did you undertake any business there for Kessler & Company? A. Well, I called on a number of people there, but I don't think there was any-
1548 thing special.

Q. Did you call on anyone that had any business relations with Kessler & Company? A. Yes, sir.

Q. Who? A. I called on the Bank fuer Handel u. Industrie.

Q. You were in Frankfort two months? A. Yes, sir.

Q. And, during the two months, did you stay altogether in Frankfort? A. No; I went to Brussels for a day or two at the end of July.

Q. And anywhere else? A. I think I also went to Paris during that time.

Q. Anywhere else? A. Yes, I went to Switzerland. 1549

Q. Anywhere else? A. No, sir.

Q. Now, who else besides the Bank fuer Handel u. Industrie did you see in Frankfort to talk business with? A. Nobody at that time; nobody during those two months, I think.

Q. Well, after the two months, did you see anybody? A. Yes; I did see during the two months, Mr. Burgiens of Gebrueder Bethmann.

Q. Well, anyone else? A. No, sir, I think not.

Q. Now, Burgiens had a judgment against you, hadn't he? A. I think not.

Mr. Elkus: I object to that.

1550

Q. You say you think not? (No answer.)

Q. I answer you whether you know Burgiens or any institution in which he is interested had recovered a verdict against Kessler & Company?

Mr. Elkus: I object to it as incompetent and immaterial and irrelevant.

Objection overruled. Exception.

A. Yes, sir.

Q. Do you know when that verdict was recovered?

Same objection. Same ruling. Exception.

1551

A. The 15th of May, 1907.

Q. Do you know the amount of the verdict.

Same objection. Same ruling. Exception.

A. About \$25,000, less an offset.

Q. Do you know the amount of the verdict? A. I say about \$25,000.

Q. Was there one judgment or more? A. Only this one.

Q. Do you know whether or not any judgment was recovered—verdict having been recovered against your firm? A. Yes, sir.

1552 Q. In whose favor? A. There is no judgment, as far as I know, Mr. Larkin.

Q. Do you know whether any verdicts have been recovered?

Mr. Elkus: I object to any testimony as to verdicts, unless there was a judgment, on that specific ground, and also on the same grounds as before, whether there was a verdict not followed by a judgment.

Objection overruled. Exception.

Mr. Elkus: And as incompetent, immaterial and irrelevant.

1553 Objection overruled. Exception.

By the Special Commissioner:

Q. Was there a judgment? A. No.

By Mr. Larkin:

Q. Mr. Flinsch, you were aware of this claim, weren't you? A. Yes.

Q. And you were present upon the trial, weren't you? A. I was.

Q. And do you know the amount of the claims made by these different plaintiffs? A. Yes.

Q. And they amount to \$125,000, don't they? A. 1554 I think it was more than that.

Q. How much? A. \$140,000, less about \$30,000 that they owed us.

Q. What was your recollection about the amount now? A. I think it is \$140,000.

Q. When you were over there, you spoke to Burgiens about it?

Same objection. Same ruling. Exception.

A. Yes, sir.

Q. And did you try to come to some settlement with him? A. Yes, sir.

Q. And he wouldn't settle? A. Yes, sir.

By Mr. Elkus:

1555

Q. He would or would not? A. He was inclined to settle. He was willing to settle.

By Mr. Larkin:

Q. Did you have any cables passing between you and the New York house regarding the cause on appeal at that time? A. Not at that time, no.

Q. Later? A. Yes, sir.

Q. When was it that you had communications with the house regarding the appeal? A. In October.

Q. Well, if Mr. Burgiens was inclined to settle, why didn't he settle? What did he say to you about it? 1556

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant, too remote.

The Special Commissioner: Well, haven't you gone far enough?

Mr. Larkin: All right.

Q. Mr. Flinsch, in regard to the Bank fuer Handel u. Industrie, what was the nature of your business with them? A. We were financing Milne, Turnbull & Company. We were making advances to Milne, Turnbull & Company, and they were looking for another partner, and the son of Mr. Jean Andreae was desirous to come, to return to this country and start in that line of business. 1557

Q. Did you have any other business with him except talking about getting him into Milne, Turnbull & Company? A. That question is not quite correct.

Q. Did you have any other business with him except talking about getting him into the firm? A. I did not try to get him into the business.

Q. You had some talk—— A. You suggest that, and I did not.

Q. I did not care anything about Milne? A. I

1558 didn't want to let that go through as if I tried to get him into it.

Q. Did you have any other talk with him, any other conversation that referred to Milne, Turnbull & Company in any way whatsoever? A. I think not.

Q. Had you any drawings with them? A. Yes, sir.

Q. Long drawings? A. Long drawings.

Q. What was the amount of the long drawings?

A. The equivalent of \$100,000.

Q. Was that secured in any way? A. That was a joint account drawing based upon Cripple Creek
1559 Central stock.

Q. When did that account start? A. In the end of May, 1906.

Q. And had been renewed from time to time? A. It had.

Q. Down to the present time? A. Yes, sir.

Q. Did you ask them to increase that amount of drawing? A. No, sir.

Same objection. Same ruling. Exception.

Q. Did they ask you to put up any additional collateral? A. No, sir. There was no collateral to be put up.

Q. You say it was a joint account secured by
1560 Cripple Creek stock? A. Yes, sir. It was a joint investment, but there was no collateral.

Q. Who did you see at Brussels? A. Walter Barth & Company.

Q. Did you do any business with them? A. Not at that time, no.

Q. Did you ask them to open credit for you? A. No, sir.

Q. What was the nature of your business? A. We are commandataires—sort of special partners in his business.

Q. Kessler & Company of New York are special

partners in Barth & Company's business? A. Yes, 1561
sir.

Q. What is their business? A. Stock and bond
brokers.

Q. Where—at Brussels? A. At Brussels.

Q. What was your investment there? A. It is
about twenty-five thousand francs now.

Q. Have you borrowed any money from them?
A. No, sir.

Q. Did you have any long drawings with them?
A. No, sir.

Q. Did you ask them to allow you to draw on
them?

Same objection. Same ruling. Exception. 1562

A. No, sir.

Q. Did you have any other business with them
than as you have stated—silent partners or special
partners in this house? A. No, sir.

Q. Did you ask them to go into any new busi-
ness? A. I discussed with them Cripple Creek
Central stock.

Q. Did you ask them to allow you to draw on
them with the Cripple Creek stock as collateral?
A. No, sir.

Q. Who did you see at Paris? A. I saw Messrs.
Louis Dreyfus & Company, Messrs. Heine & Com-
pany, Messrs. Marcuard & Company. I think that 1563
is all.

Q. Now, did you have any long drawing account
with Dreyfus & Company? A. Yes, sir.

Q. What was the amount of your long drawing
with them? A. At that time?

Q. Yes. A. I think two and one-half million
franks.

Q. Was that secured? A. Yes, sir.

Q. By what?

Mr. Elkus: I object to it as incompetent, im-
material and irrelevant, and particularly because I

1564 was not allowed to interrogate the witness Magie with reference to the same transaction.

Objection overruled. Exception.

Q. Long drawings of two million francs with Dreyfus? A. In that neighborhood.

Q. Did you have any right to draw on him without security?

Same objection. Same ruling. Exception.

A. Yes, sir.

Q. What was the amount of your drawing against Dreyfus without security? A. Nothing special; same basis.

1565 Q. And none limited? A. I think so, yes.

Q. How long had your arrangement with Dreyfus & Company gone on? A. I think two and one-half years.

Q. Had your drawings increased in the last year over what it had been the prior years?

Objected to as incompetent, immaterial and irrelevant. Objection overruled. Exception.

A. Not during the last year.

Q. Did your arrangement with Dreyfus & Company continue down to the time of the assignment?

A. Yes, sir.

1566 Q. Did they ask you to reduce your drawings on them? A. No.

Q. Or to increase your collateral? A. No, sir.

Q. How about Heine & Company. Did you have any drawing account with them? A. Yes, sir.

Q. To what extent? A. 150,000 francs.

Q. When was that arrangement made? A. Before I came to the firm.

Q. Was that drawing secured? A. No, sir.

Q. Had this arrangement continued during all these years? A. Yes, sir.

Q. As the drafts matured, they were renewed? A. Yes, sir.

Q. Did you have any other business with Heine— 1567
any new business? A. No, sir.

Q. How about Marcuard? A. We drew long
drafts on Marcuard also—100,000 marks blank
credit, without security.

Q. How long had that arrangement with Mar-
cuard been going on? A. For years.

Q. And they had been renewed from time to time
down to the assignment, had they? A. I couldn't
say that every draft had been renewed at maturity,
but sometimes — They might have been paid off;
but we always had the right to draw on them.

By Mr. Elkus:

1568

Q. Was that so with all the others? A. Yes. I
don't mean to say that a draft at maturity would
immediately be renewed again.

By Mr. Larkin:

Q. It was, generally, wasn't it? A. Done with
Dreyfus.

Q. About Marcuard and the others? A. I don't
think it was generally, no, but Mr. McLean can tell
you, undoubtedly.

Q. Did you have any other negotiations with
Marcuard about any other business? A. Discount-
ing business and so on.

1569

Q. Did you make any arrangement with them?
A. No. I talked with him.

Q. Did you ask him to increase your drawing?
A. No, sir.

Q. Now, in Switzerland, you went to Switzerland
during the two months you were in Frankfort? A.
Yes, sir.

Q. Who did you see in Switzerland? A. In
Zurich, I saw the Schweizerische Kreditanstalt
and Akliengesellschaft, Leu & Company, and a
number of private customers.

Q. Well, what did you do with the Switzerland

1570 people? A. With the Schweizerische Kreditanstalt?

Q. Yes. A. Nothing, sir.

Q. What did you go to see them for? A. Well, they had been correspondents of ours for a number of years.

Q. Did you ask them to allow you to draw on them? A. No, I did not. They had written to us some years ago that they had a great demand for acceptances, and they did not want to do any more acceptance business, and I knew that, so I didn't ask them for any increase, or for any credit.

1571 Q. Well, then, you had no business talk with them at all? A. No, sir; nothing excepting a general talk about business conditions.

Q. How about Akliengesellschaft, Leu & Company? A. I arranged with them for a loan on the basis of Cripple Creek stock and joint account for the equivalent of \$100,000.

Q. And did you get it? A. Yes.

Q. What became of the \$100,000? A. The business was done. That is to say, the draft was done, the equivalent of \$100,000 was drawn at the time and was continued to the date of the assignment.

By the Special Commissioner:

1572 Q. Still outstanding? A. Yes, sir.

Q. And liable against you. A. Yes, sir.

Q. They hold the collateral? A. No; the collateral is here.

By Mr. Larkin:

Q. In the hands of the Receiver? A. Yes.

Q. Do you remember what date it was? A. August 30th, 1907.

Q. Where did you go at the expiration of the two months that you referred to at Frankfort? A. I went to Baden-Baden.

Q. Did you do any business there with any one? 1573
A. No, sir.

Q. Did you see any one on business? A. No, sir.

Q. After Baden-Baden, where did you go? A. I beg your pardon. I had one call, a business call from a man, but I think it had nothing to do with the business that you are trying to obtain. Do you want to know? A. No, I do not care about it.

Q. Where did you go after you left Baden-Baden? A. I went back to Frankfort. First to Stuttgart and then to Frankfort.

Q. Did you see anybody on business at Stuttgart? A. Yes, I saw the Daimler people.

Q. And the Daimler concern which your house 1574 was interested in? A. Yes, sir.

Q. Tried to get them to buy it? A. Well, I couldn't say that, no.

Q. Well, what did you see them about? A. About bringing about a more profitable arrangement between the two firms.

Q. Mr. Flinsch, do you remember a conversation with Mr. Burgienes that you refer to? A. Yes, sir.

Q. Did you state to him anything as to what would happen to Kessler & Company in the event of the entry of judgments against Kessler?

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant. 1575

By the Special Commissioner:

Q. Did you say anything to him on that subject?
A. Yes, sir.

By Mr. Larkin:

Q. What did you say? A. In connection with the statement?

Q. What did you say on the subject of the effect on Kessler & Company of New York of the entry of a judgment? A. I said that under the present critical conditions of all financial markets, it would

1576 have an effect upon our credit which I did not like or which I would not like.

Q. Is that all that was said? A. I told him—

Q. That it might compel you to make an assignment? A. No, I didn't do anything of the kind.

Q. What did you tell him? A. Just what I told him. I said it might have a very bad effect.

Q. Very serious effect? A. Yes, sir.

By Mr. Elkus:

Q. On your credit, on your rating? A. Yes, sir, on the credit.

1577 Mr. Larkin: I offer in evidence letters sent by Mr. Flinsch to Alfred Kessler during the period between June 27, 1907, and November 1st, 1907.

Mr. Elkus: I object to each and every one on the ground that they are incompetent, immaterial and irrelevant and cannot bind or affect Kessler & Company, Limited, or the Liquidator of the corporation, and that as to the letters that precede October 25th, they are too remote, and as to the letters that follow October 25th, I make the same objections; and I make this objection with the same force and effect as though I had made it to each letter separately—as if each letter was offered by itself; and, when an exception is given me, I understand that is given me with the same force and effect.

1578

The Special Commissioner: Yes.

By stipulation in open court between the counsel, these letters, which are voluminous and numerous, are to be typewritten, counsel for the Receiver is to designate such portions as he wishes to offer in evidence, and (when that is done, the Special Commissioner will pass on the competency and relevancy of the testimony and also upon any portions of the letters that may be offered on behalf of Kessler & Company, Limited.

Mr. Elkus: I presume that either party may have 1579
the right to examine Mr. Flinsch with reference
to those parts of the letters that are put in evi-
dence?

The Special Commissioner: Yes, sir. Both sides
may want to ask some questions.

The said letters are marked, respectively,
Receiver's Exs. 14 to 37, both inclusive, for
identification.

RUDOLF E. F. FLINSCH, (direct-examination re-
sumed).

By Mr. Larkin:

1580

Q. You have produced here and delivered to the
Receiver, by your counsel, certain letters which you
wrote to Alfred Kessler while you were abroad?

A. Yes, sir.

Q. Will you tell me, please, where the letters
which were received by you from Alfred Kessler
while abroad are? A. You have them, too, haven't
you?

Q. I have not, no. A. I have those letters, but
they are not complete. The copies that were in
Mr. Alfred Kessler's copy book contain some let-
ters which I have not got. I am short several of 1581
his letters.

Q. Have you gone over Mr. Kessler's letter book
to check off the letters which you have received?

A. Yes, sir.

Q. You have checked off some, and some of those
which you did receive you haven't now in your pos-
session? A. Yes.

Q. So this is a more complete record? A. Yes.

Q. This private letter book of Alfred Kessler's
is a more complete record of the letters sent by
him to you than the original which you have in

1582 your possession? A. Yes, sir. I remember that I got every one of those letters.

Mr. Larkin: I will state that, with respect to the letters of Kessler & Company, of New York, to Kessler & Company, Limited, letter-press copies of which have heretofore been offered in evidence, I stipulate that these letter-press copies will have the same force and effect as if they were originals, my objection not being to that point but that they are irrelevant and incompetent to prove certain of the facts therein stated.

1583 Mr. Elkus: I stipulate that the letter-press copies of letters written by Alfred Kessler to Mr. Flinsch may have the same force and effect as though they were original letters—as to those letters which Mr. Flinsch identifies as having been received by him.

Mr. Larkin: I offer in evidence the letters in question of Alfred Kessler to Mr. Flinsch during the same period—that is, from June 27th to November 1st—within that period.

Mr. Elkus: I make the same objection as to these letters as I did to the others.

The same stipulation in regard to these letters is entered into as was entered into in regard to the letters first offered in evidence to-day.

1584 The Special Commissioner: I reserve my decision until I can see what they are.

Mr. Larkin: I presume Mr. Elkus will make the same stipulation with regard to the letter-press copies written by Alfred Kessler to Manchester?

Mr. Elkus: Yes.

Mr. Larkin: I offer this book for identification and offer in evidence all the letters in that book written by Alfred Kessler or Kessler & Company to Kessler & Company, Limited, of Manchester, or P. W. Kessler.

Mr. Elkus: We concede that these letter-press 1585
copies may have the same force and effect as if
they were originals and no more.

The same stipulation in regard to these letters is entered into as was entered into in regard to the letters first offered in evidence to-day.

Mr. Elkus: In addition to the other objections which I made to the other letters, I specifically object upon the ground that they are not addressed to or received by Kessler & Company, Limited—as to those which are not addressed to or received by them—and therefore they have no binding effect of any kind and do not serve as any notice to Kessler & Company, Limited; that a letter addressed to an individual who may or may not be a director or officer of a corporation does not bind the corporation, does not affect the corporation and cannot be any notice to the corporation. 1586

The book and letters above referred to are marked, respectively, Receiver's Exs. 38 to 53 for Identification.

Q. The various letters which you wrote to Alfred Kessler substantially state the work that you did and tried to do when you were abroad, do they not?

A. Yes, sir.

Q. Now, when was it that you left Paris for London and Manchester? Can you fix the date?

A. Well, I went back to Frankfort and from Frankfort to Switzerland, and then to Frankfort, and then to Baden Baden. 1587

Q. At Baden Baden, did Mr. P. W. Kessler come to see you? A. No, at Frankfort I met him.

Q. What time was that? A. The 17th of September.

Q. How long did he stay with you in Frankfort?

A. I saw him from five o'clock in the afternoon until about half-past seven.

1588 Q. Did he come from Baden Baden to see you?

A. No; I came from Baden Baden.

Q. He was at Frankfort? A. He arrived that afternoon from England to go to Switzerland, and I came from Baden Baden to meet him at Frankfort on his way through.

Q. What was the subject of your talk with him during those two hours?

Mr. Elkus: That is objected to as incompetent, immaterial and irrelevant and in no way binding upon Kessler & Company, of Manchester, and as too remote.

1589 Objection overruled. Exception.

A. I asked about general conditions. He told me what the securities were that had been put up for that special escrow—twenty thousand pounds. I reported to him about the Cripple Creek Central Railway.

Q. Now, what else? A. The chief subject upon which we spoke was the relations with Mr. Gillett and the difficulties that I had had with him in June and how they had been settled.

By Mr. Elkus:

1590 Q. That is, you had with Gillett? A. That I had with Gillett.

By Mr. Larkin:

Q. When you say "you," you mean the firm? A. The firm and I, personally.

Q. Now, you had met Gillett in London in June, hadn't you, or July? A. Yes, sir.

Q. And you had had several conferences with him? A. I had.

Q. And this position was that he wanted to retire from the firm or what? A. No, sir.

Q. What was the dispute?

Mr. Elkus: I object to the dispute or what took place as incompetent, immaterial and irrelevant. 1591

Objection overruled. Exception.

A. About certain investments that I held Mr. Gillett responsible for.

Q. And he had threatened to retire from the firm, or at least he stated he was going to retire from the firm?

Mr. Elkus: May we have all this taken under the same objection and exception with the same force and effect as if made to each question?

The Special Commissioner: Yes.

A. His retirement from the firm was not discussed particularly. 1592

Q. Didn't he say to you that he was going to pull out, as you express it?

Same objection. Same ruling. Exception.

A. Not at that time, no.

Q. I just want you to give before the Referee at any time the matters in dispute between you and Gillett or your firm and Gillett? A. That is what I stated just now—certain investments for which I held him responsible.

Q. And, as a result of that, what were you trying to do? A. I wanted him to take this up. 1593

Mr. Elkus: I make the same objection to all this.

Same ruling. Exception.

Q. And he refused to do it?

Same objection. Same ruling. Exception.

A. He agreed to submit it to arbitration.

Q. Now, the arbitration agreement never went into effect, did it? It was never arbitrated?

Same objection. Same ruling. Exception.

A. It was too late.

1594 Q. It never was arbitrated? A. No.

Q. Now, as a matter of fact, you know that Mr. Gillett, on his side, made certain contentions, didn't he?

Same objection. Same ruling. Exception.

A. Certainly.

Q. What were the contentions which he made on his side?

Same objection. Same ruling. Exception.

A. That he should not be held responsible for these investments.

1595 Q. Wasn't it a matter of complaint between you and Mr. Kessler as to the amount of Mr. Gillett's drawings?

Same objection. Same ruling. Exception.

A. That wasn't a particular complaint, no.

Q. Didn't you complain that he had drawn \$35,000 since the first of January?

Same objection. Same ruling. Exception.

A. No; he had not drawn that at the time.

1596 Q. Didn't you have a dispute with him in regard to his drawing one thousand pounds during the time that these negotiations were going on in London? A. Yes; in order to bring him to time on the other points.

Mr. Elkus: I move to strike out the act of this witness as not being any testimony—as not being the subject of any conversation with P. W. Kessler, as in no way binding upon us, and as entirely incompetent, immaterial and irrelevant.

Objection overruled. Exception.

Q. I am simply trying to get before the Referee what your dispute with Gillett was—what he claimed and what you claimed. You claimed that

he was responsible for certain business matters? 1597

A. Yes.

Q. Now, what did he claim, on the other side?

Same objection. Same ruling. Exception.

A. He claimed the opposite, of course.

Q. Now, was there anything said about the money which he was drawing? A. Yes, sir.

Q. What was that that was said?

Mr. Elkus: I object specifically to this for the same reasons and the same grounds—as incompetent, immaterial and irrelevant and not binding upon Kessler & Company, Limited.

Objection overruled. Exception.

1598

A. That I declined to let him draw any more unless he would agree to settle these differences, and he should not have any more money until these differences were settled.

Q. Well, then, you came to some understanding about arbitration with him?

Same objection. Same ruling. Exception.

A. Yes.

Q. And then he did draw a thousand pounds?

A. That was part of the agreement.

By Mr. Elkus:

1599

Q. Was that agreement in writing? A. Yes.

Mr. Elkus: I object to it on the ground it is incompetent and not the best evidence. I move to strike out all this evidence, because the agreement appears to be in writing.

Objection overruled. Exception.

By Mr. Larkin:

Q. Then Mr. Gillett came to New York, did he? Or you didn't see him again, after your first few

1600 interviews with him in June? A. I haven't seen him—not since June.

Q. Now, you stated to Mr. P. W. Kessler the situation regarding Gillett?

Mr. Elkus: I object to that as calling for the witness' conclusion.

By the Special Commissioner:

Q. What did you tell Mr. P. W. Kessler in the interview in Frankfort about your relations with the firm—with Gillett?

Mr. Elkus: I object upon the same grounds as before—incompetent and irrelevant and not binding.
1601

Objection overruled. Exception.

Mr. Elkus: Tell the whole conversation.

The Witness: I told him that I had arranged with Mr. Gillett that, until the questions in dispute between us were settled by arbitration, he was not to draw any more money; that arbitration was to be had in October of this year; that I held Mr. Gillett responsible for certain sums of money, and that I felt confident that the matter would be adjusted to our satisfaction—to my satisfaction.

By Mr. Larkin:

1602 Q. Well, then, did Mr.—— A. I also told him that Mr. Gillett had told me of his having trusted away \$800,000 of his property to his wife.

Q. For his wife? A. To his wife.

Q. At what time.

Same objection. Same ruling. Exception.

A. That he had trusted to his wife \$800,000 of his (Mr. Gillett's) property.

Q. And did he say when he did that thing? A. In March, 1902.

Q. About the time this partnership was formed? A. Three months afterwards.

Q. Why was it that you said to Mr. P. W. Kessler that you were not to allow Gillett to draw any more until this question had been settled? 1603

Mr. Elkus: I object to that as giving the witness' conclusion, not a fact; on the same grounds as before.

Objection sustained.

Q. Well, were Mr. Gillett's drawings referred to in the conversation between you and Mr. P. W. Kessler? A. I have stated that already.

Q. His drawings were referred to? A. I said that I had arranged with Mr. Gillett not to draw any more money until a settlement was reached with him. 1604

Q. How was P. W. Kessler interested in Gillett's drawings?

Mr. Elkus: I object to that. That calls for his conclusion.

Objection sustained.

Q. Didn't Mr. P. W. Kessler refer to Gillett's drawing? A. No, sir; he didn't know about it.

Mr. Larkin: I move to strike out that he didn't know about it. It is irresponsive.

The Special Commissioner: Yes, strike it out.

Q. What else did you say to P. W. Kessler? Did you refer to what you had been doing during these two months? 1605

Same objection. Same ruling. Exception.

A. I think I told him in a general way that I had been in Brussels. I don't know whether I said anything more.

Q. Did you tell him that you had been in other places than Brussels?

Same objection. Same ruling. Exception.

A. That I couldn't remember. Perhaps I did, perhaps I did not.

- 1606 Q. Did you tell him what you had done in regard to getting rights for long drawings in various places?

Same objection as first taken to this line of testimony. Same ruling. Exception.

A. No, sir.

Q. Did you tell him that your credits had been cut down by the people with whom you were doing business?

Mr. Elkus: I object to that because that is not a fact.

Objection overruled. Exception.

- 1607 A. I did not.

Q. You didn't tell him that? A. No.

Q. Did you tell him anything about what you had heard from Alfred Kessler as to the conditions in New York?

Same objection as first taken to this line of testimony. Same ruling. Exception.

A. I don't remember.

Q. Did you tell him about the Orleans Quarry Company matters? A. I think so.

Q. Did you tell him about the Cripple Creek?

- 1608 Same objection. Same ruling. Exception.

Q. Did you tell him you were trying to borrow money on Cripple Creek shares? A. No, sir.

Q. Did you tell him you were trying to borrow money on the Orleans Quarry bonds? A. No, sir.

Q. Did you tell him you were trying to borrow money on Milne-Turnbull notes? A. No, sir.

Q. Did you tell him you were trying to sell any of these securities? A. I told him I was negotiating to sell Cripple Creek Central stock.

Q. Did you tell him you had a large amount of money loaned on the Cripple Creek stock? A. Yes, sir.

Q. Did you tell him you were trying to borrow 1609 money on Cripple Creek stock?

Mr. McLaughlin: We object to that on the same grounds as before.

Same ruling. Exception.

A. I think not.

Q. You don't remember? A. I don't remember; no.

Q. Did you tell him you were trying to sell Cripple Creek stock?

Same objection. Same ruling. Exception.

A. Yes, sir

Q. Did you have with you any figures which 1610 you went over with P. W. Kessler? A. What figures?

Q. Any figures? A. I don't think so.

Q. Did you have a balance sheet? A. No, sir; we didn't discuss that.

Q. Did he ask you to discuss what the condition of Kessler & Company of New York was?

Same objection. Same ruling. Exception.

A. No, sir.

Q. Did you tell him anything about the Daimler Company affairs?

Same objection. Same ruling. Exception. 1611

A. I told him that I was in touch with Daimler Motoren Gesellschaft, of Stuttgart, in order to bring about a profitable arrangement between the two companies.

Q. Well, you were trying to sell the Daimler Company, in which you had an interest, in this country? A. No, sir.

Q. Were you trying to sell any of the shares? A. No, sir.

Q. What were you trying to do, then?

Mr. Elkus: I object, your Honor.

1612 By Mr. Elkus:

Q. This was conversation with P. W. Kessler?

A. Yes, sir.

Mr. Elkus: Same objection as before.

Same ruling. Exception.

The Witness: That I was engaged in bringing about a profitable arrangement between the parent company and the American company.

By Mr. Larkin:

Q. The American company's plant had been burned at that time? A. Yes, sir.

1613 Q. Did you tell him the nature of this profitable arrangement you were trying to bring about?

Same objection. Same ruling. Exception.

A. I don't remember.

Q. You can't state what that profitable arrangement was? A. Oh, I can state it, yes.

Q. You didn't state it to him? A. No, sir.

Q. You just told him you were trying to make a profitable arrangement? A. Yes, sir.

Q. Did you tell him that the company's plant had been burned down? A. No, sir; he knew that already.

1614 Q. Did Mr. P. W. Kessler send for you at Baden Baden to meet him at Frankfort? A. No, sir.

Q. Did you go there of your motion? A. I did.

Q. Did he refer to the fact that Manchester had consented to accept twenty thousand pounds additional drawings in August? A. I stated that already.

Q. He did so state? A. I stated so already. He told me what the collateral was that had been put up against these twenty thousand pounds.

Q. Is that, in substance, all that you remember of this conversation? A. Yes, sir.

Q. Did you tell him anything about the difficulties in disposing of the Dreyfus acceptances? 1615

Mr. Elkus: I object to that as incompetent, irrelevant and immaterial.

Same ruling. Exception.

A. I think not.

Q. Did you tell him about the Schunck transaction?

Same objection. Same ruling. Exception.

A. I may have; I don't remember. It wasn't a very important matter.

Mr. Larkin: I move to strike out about not being an important matter. 1616

No ruling.

Q. You met Mr. P. W. Kessler at Frankfort and stayed with him until half-past seven. Did you go back to Baden Baden then? A. I went back next day, then.

Q. Did he go to the Alps? A. I think two or three days afterward. He stayed in Frankfort to bring his son over.

Q. Did you see him the next day at all? A. No, sir.

By Mr. Elkus:

1617

Q. How far is Baden Baden? A. Three hours by train.

By Mr. Larkin:

Q. When was it that you went to Manchester? A. The 5th of October.

Q. And you were in Manchester on that day? A. Yes, sir.

Q. How long did you stay in Manchester? A. From a quarter past one until a quarter to four.

Q. Who did you see when you were at Man-

1618 chester? A. I saw Mr. William Kessler and his son.

By Mr. Elkus:

Q. That is P. W.? A. Yes.

By the Special Commissioner:

Q. And his son? A. And his son.

By Mr. Larkin:

Q. What is the name of the son? A. I don't remember. He had been in Frankfort; the one that had been at Frankfort.

1619 Q. Won't you please state to the Referee just what you and P. W. and his son talked about? A. His son didn't talk about anything.

By Mr. Elkus:

Q. How old is the son? A. I think about twenty.

Mr. Elkus: Same objection as before.

Same ruling. Exception.

The Witness: I told Mr. P. W. Kessler that I had been to London; that there was a general dislike against American finance bills; that is to say, drafts drawn by bankers upon bankers in London; 1620 that I proposed to him an arrangement by which our drawing on London was avoided by his making arrangements for us on a commission basis, the same as in 1893.

By Mr. Larkin:

Q. And did he ask you anything about general business conditions?

Same objection. Same ruling. Exception.

A. I don't think he asked me anything about it. You mean about New York?

Q. Yes, New York business? A. No, he did not.

Q. Did he ask you anything about what you had done during the two months that you had been over on the Continent? A. Well, I had already met him on the 17th of September. 1621

Q. Did he ask you whether you had disposed of Cripple Creek stock?

Same objection. Same ruling. Exception.

A. He didn't ask me, no.

Q. Did he ask you whether you got any additional right to draw on any of the bankers on the Continent? A. No, sir.

Q. Did he refer in any way to the condition of Kessler & Company of New York? A. No, sir. 1622

Mr. Elkus: I make the same objection to all this, your Honor.

The Special Commissioner: Yes, and the same ruling.

Mr. Elkus: Exception.

Q. Did you refer to it in any way? A. No, sir.

Q. Well, why was it that you wanted to get some money from them through this commission drawing?

Mr. Elkus: I object to that as calling for his conclusion, some operation of his mind.

The Special Commissioner: You can ask him what that negotiation was. 1623

Q. You were there from one o'clock until how long? A. I think a quarter to four.

Q. Now, have you given the Referee all that you talked about in substance during that period? A. Well, we talked about personal matters.

Q. Well, I am not interested in the personal matters. A. You asked me whether I had given all the other things.

By the Special Commissioner:

Q. Any business matters? A. No, sir.

1624 By Mr. Larkin:

Q. Did you know at the time that Mr. Henry Kessler was in New York? A. Yes.

Q. Did you refer to the Quarry Company bonds again? A. Yes, sir. I told him that they were available as collateral for any business which he might do.

Q. Was that in connection with this new arrangement that you contemplated making? A. Yes.

Q. Whatever that arrangement was, it was for the purpose of getting additional money for Kessler & Company of New York to use, was it?

1625 Mr. Elkus: I object to that as calling for the operation of the witness' mind.

Objection sustained.

Q. Can you state, Mr. Flinsch, what the purpose of this arrangement was that you outlined to P. W. Kessler?

Mr. Elkus: I object to it as incompetent.

By the Special Commissioner:

Q. What outline was it? You can state what the thing was that you outlined to him.

1626 A. That he was to do business on a business basis for the New York firm by loaning us money which he was to borrow in England, thereby avoiding long drawings of the New York house on London bankers.

Q. That is the plan you spoke of that existed in 1893? A. In 1893 that had also been done.

Q. Just explain a little more in detail what your plan was? A. That the Manchester house should either draw these long bills on some English house on the basis of such securities as the New York house would give to the Manchester house or that a cash advance should be made by the Manchester house to the New York house.

Q. Did you mention the amount of that cash advance? A. No, sir.

Q. Nothing of that kind was stated as to the amount? A. No, sir—ten or twenty thousand pounds.

Q. Was ten or twenty thousand pounds mentioned? A. No, sir; I don't think so.

By Mr. Larkin:

Q. Mr. Flinsch, how did you happen to go to Manchester? A. I took the train. What do you mean—"go"? I went direct from London.

By the Special Commissioner:

1628

Q. What was your object, I suppose he means, in going?

By Mr. Larkin:

Q. Did you go at the request of Mr. P. W. Kessler or did you go on your own motion, or did you go—— A. I went on my own motion.

Q. Did you go because Mr. Alfred Kessler asked you to go? A. No; I went on my own motion.

Q. At that time you had difficulty, didn't you, disposing of the Dreyfus drafts? A. Yes, sir.

Q. You found it difficult to dispose of them in Paris?

1629

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant and in no way binding on us.

Objection overruled. Exception.

A. I had been informed by——

By Mr. Elkus:

You didn't find it difficult, did you?

A. No, sir.

1630 By the Special Commissioner:

Q. You didn't try this—to dispose of them? A. In Europe?

Q. Yes? A. No, sir.

By Mr. Larkin:

Q. Didn't you try to do something to aid the disposal of the drafts of Dreyfus when you were in Paris?

Same objection. Same ruling. Exception.

A. Arrangement in discounting? Yes, sir.

Q. Was that matter referred to when you saw

1631 P. W. Kessler in Manchester? A. No, sir.

Q. The Gillett matter, I suppose, was referred to? A. Not in October.

Q. And the Cripple Creek matter was referred to? A. You mean the sales?

Q. Yes? A. Yes, sir.

Q. Of actual sales—how many actual sales had been made of the Cripple Creek stock? A. The sales were beginning before I returned.

Q. I am asking you as to how many shares had been actually sold before you left, if you know? A. Sixty shares—\$6,000.

Q. And did you tell him that? A. No, sir.

1632 Q. Now, Mr. Flinsch, do you remember receiving a cable from Mr. Alfred Kessler on the 25th of October? A. No, sir; not on the 25th.

Q. When was it—the 26th? A. The 26th.

Q. The cable had been sent on the 25th, hadn't it? A. I presume so.

Q. Have you got that cable? A. No, sir.

Q. Do you know where it is? A. You have it.

Q. No, I haven't. A. Isn't it in that batch of cables that you have there?

Q. I want you to look through that batch and see if you can find that cable. A. I remember the contents of the cable. (Witness examines papers.)

Here it is (producing paper). Mr. Kessler said 1633
he would produce it at the hearing, you know.

Q. Is this (indicating paper) the cable that you
received? A. Yes, sir.

Mr. Larkin: I offer that cable in evidence.

Mr. Elkus: I object to it as incompetent, imma-
terial and irrelevant as against us.

Objection overruled. Exception.

Received in evidence and marked Receiver's
Ex. 54.

Mr. Larkin: The cable is as follows: It is dated
the 25th of October and was received the 26th of 1634
October: "Financial affairs critical——"

Mr. Elkus: To whom was it addressed?

Mr. Larkin: Rudolf Flinsch, Frankfort-on-
Main. "Financial affairs critical cannot sell de-
mand Central Trust has made a call loan one hun-
dred thousand dollars we require marks one mil-
lion October twenty-eighth can you obtain."

Mr. Elkus: Will you read the date when it was
received?

Mr. Larkin: The 26th of October.

Q. Did you get it in the morning? A. In the
forenoon, I think. (Witness examines cable.)
10:12 A. M. 1635

Q. Well, did you get the million marks? A. No,
sir.

Q. Did you try? A. I considered the matter.

Q. You didn't try to get them? A. I did not, no.

Q. Did you receive a cable after this? A. Yes,
sir.

Q. When did you receive it? A. On Sunday;
that is to say, the 27th of October.

Q. Have you got that cable? A. No, sir.

Q. Do you know where it is? A. I remember
it; yes.

1636 Q. Do you know where it ~~is~~—the cable? A. No, sir.

Q. What became of it. A. I don't know.

Q. Well, has it been lost or destroyed or have you got to trace it? A. I don't know. I remember it quite distinctly—what it was.

Q. Well, have you looked for that? A. Yes, sir.

Q. And you can't find it? A. No, sir.

Q. What did the cable say?

Mr. Elkus: I object to that. There is no proof of the cable being lost. It is not, anyhow—and too remote in point of time.

Q. Well, what was in it?

1637 Mr. Elkus: I object on the same grounds.

Objection overruled. Exception.

Mr. Elkus: Besides, the best evidence is the cable itself.

Q. What became of the cable? A. I don't know.

By the Special Commissioner:

Q. Well, you haven't it? A. No.

Q. And cannot be found? A. No, sir.

Q. Probably didn't keep it? A. No. Do you want the contents?

1638

By Mr. Larkin:

Q. Yes. A. It was substantially the same contents, except I don't think it said anything about the Central Trust Company. It spoke of critical conditions, and that he needed fifty thousand pounds—just the same as a million marks.

Q. Did you send any cable in response to either of those two cables? A. I cabled on the Sunday; that is to say, the day after I got this cable, suggesting——

By Mr. Elkus:

1639

Q. On what date? A. The 27th.

Mr. Elkus: I object.

By Mr. Larkin:

Q. Have you got the reply you sent? A. No, I haven't got it.

Mr. Elkus: I object to any contents of any cable, and also up on the same grounds as I objected to this cable—too remote. It is incompetent, immaterial and irrelevant.

1640

Objection overruled. Exception.

Q. Will you please look in these cables that you have given me, which were handed to me by your counsel, and just see if you can find the reply that you sent? (The witness proceeds to do so.)

HENRY KESSLER (recalled by the Receiver).

By Mr. Larkin:

Q. Mr. Kessler, you remember stating that you were at Atlantic City. A. Yes, sir.

Q. Up until the evening of the 21st of October? 1641

A. Yes, sir.

Q. Now, while you were at Atlantic City, you stated you received a letter from Mr. Alfred Kessler asking you to come to New York. Do you remember? A. Yes; when I was coming and about my letters.

Q. While you were at Atlantic City, I suppose you had your mail sent to you there from time to time? A. Yes.

Q. And while you were there, you received a

1642 cable, didn't you, from P. W. Kessler, or from the Manchester house? A. I can't remember.

Q. Are you sure you can't remember? A. I am quite sure I can't remember.

Q. Did you not receive through Alfred Kessler a cable from Manchester, or from P. W. Kessler, the substance of which is as follows:

"8th of October, 1907.

1643 "Flinch here twelve A. M. Their position not at all satisfactory. Please consult A. K., would advise selling stocks, are trying here arrange loan against Orleans, Cripple success doubtful, do not approve of more Manchester. What is best that can be done?"

Do you remember to have received such a cable? A. I believe I did; yes.

Q. What became of that cable? A. I haven't got it.

Q. You do remember it now? A. I remember it now; yes.

By Mr. Elkus:

1644 Q. Do you remember it being exactly like that? A. That I can't tell.

By Mr. Larkin:

Q. Well, substantially? A. Yes.

By the Special Commissioner:

Q. What did you do with it? A. I would have destroyed it. I destroy everything when I am traveling.

Mr. Larkin: I will now read to you, your Honor, an extract from a letter, which is one of those put

in evidence before, written by Alfred Kessler to Mr. 1645
Flinsch. The letter is dated the 8th of October:

"Yesterday we got your and Willie's cable to Henry, who could give me no advice, and went to Philadelphia. The cable read 'Flinsch here 12 A. M., their position not at all satisfactory. Please consult A. K., would advise selling stocks, are trying here arrange loan against Orleans, Cripple success doubtful, do not approve of more Manchester. What is best that can be done?'"

"This last sentence is the great conundrum which cannot be solved.

"To-day I cabled reply Henry Kessler, 1646
Philadelphia: 'We have arranged balance Orleans, Flinsch's father should help,' "

and so on.

RUDOLF E. F. FLINSCH (direct-examination resumed).

By Mr. Larkin:

Q. Have you been able to find your answer to it?
A. No, sir.

Q. Mr. Flinsch, when you were in Manchester, did Mr. P. W. Kessler refer to any letters which he had received from Mr. Alfred Kessler? A. I think 1647
not.

Q. You knew that it was the practice of Mr. Alfred Kessler to communicate with P. W. Kessler and Kessler & Company practically every week, didn't you? A. No, I didn't.

Q. Weren't you aware of what were called private letter books, that Alfred Kessler kept? A. I knew he had a letter book; yes.

Q. You knew he was writing frequently, then, if

1648 not every week? A. I knew he wrote from time to time; yes, sir. I didn't know what he wrote.

Q. Are you quite positive that when you were in Manchester, P. W. Kessler didn't refer to the reports which he had received from Mr. Alfred Kessler? A. Oh, he may have; I don't remember that he did.

Q. You don't remember that he didn't, do you? A. No. My recollection is that he did not.

Q. Do you know that Mr. Gillett, on August of the present year, asked for a loan of \$15,000 from the firm.

1649 Mr. Elkus: I object to that as incompetent, immaterial and irrelevant, and in no way binding upon Kessler & Company of Manchester.

Objection overruled. Exception.

A. I had a letter from Mr. Kessler in September, in which that interview was mentioned.

Mr. Elkus: I move to strike it out as hearsay.
The Special Commissioner: Yes, strike it out.

Q. Mr. Flinsch, the Daimler works were burned in February—the 14th of February? A. Yes.

Q. And it was a total loss, wasn't it—the factory?

1650 Mr. Elkus: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. Yes, sir.

Q. Now, you got about \$300,000 insurance? A. I think so.

Q. Do you know how that \$300,000 insurance was applied? A. It paid off advances which Kessler & Company had made to the Daimler Manufacturing Company.

Q. Do you with the Referee to understand that¹⁶⁵¹ you had no other investment in the Daimler concern? A. No.

Q. You took the \$300,000 and applied it in part payment of obligations which Kessler & Company had advanced for the Daimler Company? A. Yes, sir.

Q. It was out in Long Island City, wasn't it? A. Yes, it was.

Q. Wasn't it true that the amount of your investments in connection with the Daimler Motor, directly and indirectly, was something about \$600,000? A. I think not; no.

Q. How much? A. I think between four and¹⁶⁵² five hundred thousand dollars.

Q. After you had received the \$300,00 on account? A. Yes, sir.

By Mr. Elkus:

Q. You mean still remaining unpaid, \$400,000? A. There were advances made, and you understand, in addition to that, they invested——

By Mr. Larkin:

Q. I am speaking of the total amount that you had up in the Daimler thing in any way, then, was something between four and five hundred thousand¹⁶⁵³ dollars? A. Yes, sir.

Q. After you had received the \$300,000? A. Yes, sir.

Q. And that continued right down to the time of the assignment? A. Yes, sir.

By Mr. Elkus:

Q. Was there other security for that, or was it represented by other property? A. Stock and other property.

1654 By Mr. Larkin:

Q. In other words, you say that—— A. I say there was stock and other property.

By the Special Commissioner:

Q. Was there still a debt owing to you from that company or was there an investment by Kessler & Company? A. There was a debt still owing to Kessler & Company of a very much smaller amount.

Q. About how much? A. Forty or fifty thousand.

1655 Q. And the rest? A. Was practically an investment.

Q. That you had made in the securities of the Daimler Company? A. Yes, sir, it amounted to an investment.

By Mr. Larkin:

Q. In other words, it was a note with the collateral of the Daimler shares as a part? A. Yes.

Q. Now, that amount—Mr. Flinsch, would you be surprised to know it is over \$600,000? A. Yes, sir; I am surprised.

1656 Q. Have you looked at the books lately in that connection? A. No, sir; can't get at them.

Q. Can't get at them? A. No, sir.

Q. Well, you have no reason to believe but that the whole transaction of Kessler & Company of New York with the Daimler people shows on the books?

Mr. Elkus: I object to that.

No ruling.

A. Absolutely; yes, sir.

Q. Mr. Flinsch, I notice that there is an account 1657 referred to in the various letters called "Suspense Account K. K." Do you know what that is? A. That is an account that was left over from the old firm made up by William Kessler, now deceased; Mr. G. E. Kissel and Mr. Alfred Kessler.

Q. That account appears upon the books of the firm? A. Yes, sir.

Q. And when the firm makes a profit, that account is credited and when it make a loss that account is debited? A. I think not.

Q. What is your understanding of that? A. That was an account practically liquidating some interests of that firm as made up by these gentle- 1658 men.

Q. What is "Suspense Account K. F."? Do you know that? A. That is left over in the same way out of the firm as made up previous to the present one—by Mr. William Kessler and Mr. Alfred Kessler and myself.

Q. And is that account credited with a certain amount each year when profits are made and debited when losses are made?

Mr. Elkus: I object to this witness stating that. The account speaks for itself.

Objection overruled. Exception.

1659

A. I think the share of those is debited.

Q. Debited? A. Yes, sir.

Mr. Elkus: I move to strike out all the evidence as to "K. F." account on the ground it is incompetent, immaterial and irrelevant.

Objection overruled. Exception.

Mr. Elkus: I renew my motion to strike out this testimony.

1660 The Special Commissioner: No; I will let it stand, but it does not seem to me to have any particular bearing.

Mr. Larkin: I shall not pursue it any further, your Honor.

Q. There are two letters here in this book that I am going to call your attention to. A. Yes, sir.

Mr. Larkin: These two letters, Mr. McLaughlin and Mr. Elkus, in this book, which has been marked for identification, refer to the escrow and are not a part of the file which you have—one on the 8th of January, 1904 (page 14), and one on the 31st of
1661 December, 1906 (page 206). The letter of the 8th of January, 1904, is as follows:

“DEAR WILLY:

“I have still to answer yours of 23rd December in regard to escrow. Owing to the delay in getting the new United Breweries bonds and stocks, which are now promised for next week (as you had bonds, notes, stock and coupons of Continental Trust Company in your escrow and it was so mixed up) I have made a new escrow consisting of
1484 Oklahoma Gas & Electric

1662	stock, at 25,	\$37,110
	2428 United Lighting & Heating	
	Co., at 10,	24,280
	2352 Daimler Mfg. Co. stock, at	
	50,	117,600
	\$36,000 United Breweries new	
	bonds, 100,	36,000
	\$50,000 United Breweries First	
	Mortgage 6% notes,	50,000”

Then crossed out is the following entry, a pencil 1663 running through it:

"\$25,000 notes of Charles J. Devlin 6% with W. K. Gillett endorsement (and something which I can't make out), \$25,000.

(The \$25,000 is crossed out)

"Our participation receipts in first mortgage bonds of Chicago & Great Western at 89 covering part of main line between Chicago and Omaha, \$134,000, at 89,

\$119,972

"Plus 1340 shares Com. stock of Chicago Great Western Railroad, 15,

1664

20,220.00

405,172.00

"Besides this, you have 1606 United Lighting & Heating, 10,

16,060.00

\$421,232.00"

I don't know whether there is any use in reading the rest of this. It is about various railroad matters, and I am satisfied to have just this put in.

Under date of 1st of January, 1904, you will find the substance of the same letter addressed to 1665 Kessler & Company, Limited, of Manchester, so far as it relates to the escrow.

Now, the other letter is on the 31st of December, 1906. This letter is as follows:

"31 Dec., 1906.

"Messrs. KESSLER & Co., Ltd.,
Manchester.

DEAR SIRs:

"Enclosed we beg to hand you checks to
"\$25,000 notes of Charles J. Devlin 6%

1666	with W. K. Gillett endorsement (and something which I can't make out), \$25,000. (The \$25,000 is crossed out) "Our participation receipts in first mortgage bonds of Chicago & Great Western at 89 covering part of main line between Chicago and Omaha, \$134,000, at 89,	\$119,972
	"Plus 1340 shares Com. stock of Chicago Great Western Railroad, 15,	20,220.00
		<hr/> 405,172.00
1667	"Besides this, you have 1606 United Lighting & Heating, 10,	16,060.00
		<hr/> \$421,232.00"

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Now, the other letter is on the 31st of December, 1668 1906. This letter is as follows:

"31 Dec., 1906.

"Messrs. KESSLER & Co., Ltd.,
Manchester.

DEAR SIRS:

"Enclosed we beg to hand you checks to order of William Kessler Executors for £493.17.4 at 483-1/2, \$2,387.84, six months interest to 31st December, 1906, on \$95,513.87.

"£263.14.0 at 483-1/2, \$1,275, six months interest to 31st December, 1906, on \$51,000 loan to our Mr. Alfred Kessler.

"£15.13.1 at 483-1/2, \$75.70, six months 1669
interest to Decr. 31st, 1906, on \$3,028.15,
Clinton property, etc.

"Before paying anything on loan, we
would like to realize something on Cripple
Creek Central Syndicate.

"Having made a few changes in your
escrow with us for our long drawings, we
enclose a new list as they stand to-day, of
which please take note."

Mr. Elkus: I have already objected, and my
objection is noted.

The Special Commissioner: Yes.

1670

Q. I call your attention to the following letter,
Mr. Flinsch, dated 2d August, 1907:

"DEAR WILLY:

"Yours of 12th July to hand, etc.

"Gillett has been drawing too much
money for living expenses. He has drawn up
to date \$35,000 since first of year, and F.
would not send him the last fes. 10,000 he
asked for. This brought up the question of
the D. T. W. coupon advance account and
the Pittsburg, Westmoreland & Somerset.
They have reached and signed an agreement
that both matters should go to arbitration in 1671
October, when they are both back. I expect
Flinsch will write or tell you all about it,
and he can do it better than I can, as I did
not hear all their verbal conversation."

Then there is a reference to Salt Creek Oil, which
I will not take up the time to read.

"Our drafts are running pretty big on you
at present for the very reason you mention.
The Dresdner Bank stopped our drawing
long, also the Basler Bank wanted A 1 bonds
as collateral. Swiss money is too dear, any-

1672

way. Then Hardy Nathan went out of business. We had £10,000 with them and the German Bank did not want to continue the business. Rueffer also cut us down £10,000.

1673

"I may want to draw on you a special £20,000 against Orleans Quarry notes with bonds attached. This loan fell due end of April but we gave them two months more to pay up in. I am just trying to get them to pay, but I suppose it may take two or three weeks still. The company last year made \$28,000 above final charges, 6% of \$350,000 bonds—\$21,000. I took some of them out of your escrow only a month ago. The company reports doing very well to-day. We also advance to them 75% on bills receivable. They pay us 6% interest and 1% commission every three months.

1674

"The basis of the loan on bonds in 75%, whereas the bonds ought to be worth 90 at least. There are 14 miles of stone quarries at Medina and Albion in New York State just between the N. Y. Central R. R. and the Canal. There is a debenture mortgage of \$1,200,000 on the property, but no interest can be paid on same until first mortgage bonds are paid off.

"*Meissner*. If we had asked Glyn for a £ s. d. cable I would have given it him and as to rate, well, I am convinced indeed it would have been more favorable than Brown's. I return enclosed his letter.

"Flinsch is doing some good work anyway. So far he has got Mrs. de Noville to pay off her debt to us, \$45,000—Edgar one-half his debt, \$10,000—and his father's \$70,000, which we ought to have got in 1896. So far the first has gone through, the second 12 Aug., the third about the 18 Aug., I hope.

If we could only get Schaner to do the same." 1675

Then there is some personal matter, which I will not read.

Q. Having had that letter read to you, does it refresh your recollection as to any matters that were referred to in your conversation in October with Mr. P. W. Kessler at Manchester? A. No, sir; I don't think so. That was all discussed in September.

Q. Was the Dresdner Bank matter discussed in September? A. No, sir.

Q. Was the Dresdner Bank matter discussed in October? A. No, sir. 1676

Q. How about the Basler Bank? A. That wasn't discussed on either occasion.

Q. Hardy Nathan going out of business? A. No, sir.

Q. That wasn't discussed? A. No, sir.

Q. Nor the German Bank? A. The German Bank took over, as I stated the other day——

Q. Did you say anything about Rueffer? A. No, sir; I think not.

Q. I forget about this matter of the cable reply which you said you sent to Mr. Alfred Kessler. I don't know whether you answered that or not. A. I didn't find the cable, but I said I remembered it. 1677

Q. That was a cable sent by you in reply to Mr. Alfred Kessler? A. Of the 26th, yes.

Q. Has it been lost? A. Have I——

Q. Have you made a search for it at any time? A. I didn't get it.

Q. Have you looked through the files in the office after your return to find any of these cables?

A. No, sir; I have not.

Q. What did you say in reply? A. I cabled——

Mr. Elkus: I object as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

1678 A. I cabled to Mr. Kessler on Sunday, the 27th, advising him to confer with Mr. Morgan.

Q. You found conditions in the various centres that you went to unfavorable?

Mr. Elkus: I object to that.

No ruling.

Q. What did you find the conditions to be? A. On the Saturday when I got that cable——

Mr. Elkus. I object to that. That calls for a conclusion.

Mr. Larkin: I withdraw the question.

1679 Q. When did you first hear of this assignment, Mr. Flinsch? A. I read it in the Marconi paper which is published on the steamer—Friday, the 1st of November.

Q. And when did you arrive here—on the 5th of November? A. I did.

Q. And did you see Mr. Alfred Kessler that day? A. Yes, sir.

Q. What took place between you?

Mr. Elkus: I object to that as too remote. It is not binding on us, anyway—conversation that took place on the 5th of November between these two
1680 partners. It is incompetent, immaterial and irrelevant.

Objection sustained.

NEW YORK, December 18th, 1907. 10:30 A. M. 1681

Before PETER B. OLNEY, Esq., Special Commissioner.

APPEARANCES:

Mr. LARKIN, of counsel, for the Receiver.

Mr. McLAUGHLIN, for Kessler & Co., L't'd.

Mr. SEYMOUR, for Kessler & Co., the Bankrupts.

Met pursuant to adjournment.

Mr. McLaughlin: Owing to the absence of Mr. Elkus, who is actually engaged in the trial of a case in the Supreme Court, we are unable to go on to-day, your Honor. 1682

Mr. Larkin: I would like to put in the assignment anyway. I have a man here from the County Clerk's office and I don't want to bring him down again.

The Special Commissioner: You can put in the assignment, subject to a motion to strike out.

EDWARD J. H. ROGERS, called and sworn as a witness in behalf of the Receiver, testified as follows:

DIRECT-EXAMINATION.

1683

Examined by Mr. Larkin:

Q. What is your name, please? A. Edward J. H. Rogers, 65 West 102nd Street, Manhattan.

Mr. McLaughlin: In regard to this assignment, there may be some technical objections that are quite serious.

The Special Commissioner: Yes. You can reserve your objections and bring them up at any time.

Q. You are connected with the County Clerk's office? A. I am.

1684 Q. And you have been subpoenaed to produce a certain paper here? A. Yes.

Q. Have you the paper? A. Yes. (Handing same to counsel.)

Mr. Larkin: I offer in evidence a certain Indenture, dated the 30th of October, 1907, between Alfred Kessler, Rudolph E. F. Flinsch and William K. Gillett, of the first part, and William Williams, of the second part, which purports to be a general assignment for the benefit of creditors; received and recorded in the County Clerk's office of New York County on October 30th, 1907, at 2:41 P. M., and purporting to be executed by Kessler & Com-
1685 pany, Alfred Kessler individually, and William Williams; and acknowledged on behalf of the firm and by Alfred Kessler individually, and by William Williams.

Mr. McLaughlin: We understand that is to be admitted for the present subject to a motion to strike out on our part, and that our right to object to the same on any and all grounds is reserved?

The Special Commissioner: Yes, at the next hearing.

The Assignment is received in evidence as Receiver's Exhibit No. 55, and is as follows:

1686 "THIS INDENTURE, made this 30th day of October, 1907, between ALFRED KESSLER, residing at No. 26 West 39th Street, in the Borough of Manhattan, City of New York, State of New York; RUDOLPH E. F. FLINSCH, residing at No. 40 East 69th Street, in the Borough of Manhattan, City of New York, State of New York, and WILLIAM K. GILLETT, residing at the Hotel Belmont, in the Borough of Manhattan, City of New York, State of New York, now carrying on the business of bankers at No. 54 Wall Street, in the Borough of Manhattan, City of New York, State of New York, as

partners, under the firm name of **KESSLER** 1687
& COMPANY, parties of the first part, and
WILLIAM WILLIAMS, residing at No. 1 West
54th Street, in the Borough of Manhattan,
City of New York, State of New York, party
of the second part, WITNESSETH: That .

WHEREAS, the said parties of the first part
are indebted as co-partners to sundry per-
sons in various sums of money, which they
are unable to pay in full, and are desirous
of applying all the firm property and assets
belonging to them as such firm or co-part-
nership to the payment of the debts of said
firm;

NOW, THEREFORE, the said parties of the 1688
first part, for and in consideration of the
sum of one dollar to each of them in hand
paid by the party of the second part at or
before the delivery of these presents, the
receipt whereof is hereby acknowledged,
have sold, assigned, transferred, granted,
bargained and conveyed unto the said party
of the second part, his successors and as-
signs, and by these presents do sell, assign,
transfer, grant, bargain and convey unto the
said party of the second part, his successors
and assigns, all and singular the estate and
property, real and personal, of every kind 1689
and nature and wheresoever the same may
be of the said parties of the first part which
is held or owned by them as such firm as
aforesaid.

TO HAVE AND TO HOLD the same and every
part thereof with the appurtenances unto
the said party of the second part, his suc-
cessors and assigns, IN TRUST NEVERTHELESS
for the following uses and purposes:

(1) to receive and take possession of all
and singular the estate and property above

1690

assigned, transferred and conveyed, and to collect and get in all bills, promissory notes, accounts, choses in action, claims, demands and moneys due or owing the said parties of the first part as such firm, and with all reasonable diligence to sell the real and personal property hereinbefore conveyed and assigned, and convert the said assigned property and estate into money.

1691

(2) And out of the proceeds to pay and discharge all reasonable costs, charges and expenses of carrying out the trust hereby created, including the lawful commissions to the party of the second part for his services as assignee under the assignment.

(3) The residue of the said proceeds shall be applied by the party of the second part to the payment in full of all and singular the debts and liabilities now due, or to grow due from the said parties of the first part as co-partners, and if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proportion.

1692

(4) And in furtherance of said premises, the said parties of the first part do hereby make, constitute and appoint the party of the second part their true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises, to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons all property, debts or demands due, owing and belonging to said parties of the first part as such partners, and give acquittance and

discharge for the same; to sue, prosecute, 1693
defend and implead for the same; and to
execute, acknowledge and deliver all neces-
sary deeds, instruments and conveyances,
and to sign the firm name of the parties of
the first part to any check, draft, promis-
sory note or other instrument in writing for
the payment of moneys which is payable to
the order of the parties of the first part, and
to sign the firm name to any instrument in
writing of any name, kind or nature which
may be necessary to more fully carry into
effect the object, design and purpose of this
trust.

1694

The party of the second part doth hereby
accept the trust created and reposed in him
by this instrument, and covenants and
agrees to and with the said parties of the
first part, and each of them, that he will
faithfully and without delay execute the
trust created according to the best of his
skill, knowledge and ability.

In witness whereof, the parties to these
presents have hereunto set their hands and
seals the day and year first above written.

(Sd.) KESSLER & COMPANY, [L. S.]

" ALFRED KESSLER, [L. S.]

" WILLIAM WILLIAMS. [L. S.]

1695

STATE OF NEW YORK, }
County of New York. } ss.:

On this 30th day of October, 1907, personally
before me appeared Alfred Kessler, to me person-
ally known and known to me to be a member of
the firm of Kessler & Company, and one of the in-
dividuals mentioned and described in and who exe-
cuted the foregoing instrument, and he acknowl-
edged to me that he executed the same in the name

5
6
5

5
6
6

566

Edward J. H. Rogers.

1696 and on behalf of Kessler & Company and in his own name individually.

(Signed) PHILIP HUETWOHL,

[L. S.]

Notary Public,

Kings Co.

Certificate filed in N. Y. Co.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 30th day of October, 1907, personally before me appeared William Williams, to me personally known, and known to me to be one of the persons described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

1697

(Signed) PHILIP HUETWOHL,

[L. S.]

Notary Public,

Kings Co.

Certificate filed in N. Y. Co.

Adjourned to Saturday, December 21st, 1907, at ten thirty A. M.

NEW YORK, December 21, 1907, 10.30 A. M.

1698

Met pursuant to adjournment.

APPEARANCES:

MR. LARKIN, For the Receiver;

MR. McLAUGHLIN, For Kessler & Company,
Ltd.

Adjourned by consent to December 24, 1907, at 11 A. M.

NEW YORK, December 31st, 1907, 10.30 A. M. 1699

Met pursuant to adjournment.

Same appearances.

Mr. Elkus: I will state my objections to the general assignment by the partners of Kessler & Company to Mr. Williams. I object to the introduction of it: First, as incompetent, immaterial and irrelevant to these issues. Second, on the ground that it is only what purports to be a general assignment under the laws of the State of New York for the benefit of creditors, made by three partners of the firm of Kesler & Company, to wit, Alfred Kessler, Mr. Flinsch and Mr. Gillett. It is only signed and executed by Mr. Kessler and neither assented to nor executed nor purported to be executed by either of the other partners, and it is therefore void under the laws of this State, and it can have no binding effect nor any effect upon the issues in this case nor upon Kessler & Company, Limited, of Manchester. 1700

Objection overruled. Exception.

ROBERT POOLE, a witness called on behalf of the Receiver, being duly sworn, testified as follows:

By the Special Commissioner: 1701

Q. What is your occupation? A. Messenger.

Q. Where are you employed? A. For the receiver of Kessler & Company.

Q. Where was your employment before that? A. For Kessler & Company.

Q. How long were you with them? A. Nearly 11 years.

DIRECT-EXAMINATION BY MR. LARKIN:

Q. You were employed by Kessler & Company before their assignment, weren't you? A. Yes, sir.

Q. As a messenger? A. Yes, sir.

1702 Q. How long have you been in their employ? A. Nearly 11 years.

Q. And you have had to do with the filing of letters received and cables received and matters of that kind? A. Yes, sir, at times.

Q. And did you have a letter file for filing away letters received? A. Yes, sir.

Q. Did you have copy books to copy letters sent? A. Yes, sir.

Q. And did you have copy books to press cables which were sent? A. Yes, sir.

Q. Now, you have been asked, haven't you, to make a search for cables and letters received and sent between Kessler & Company of New York and Kessler & Company of Manchester? A. Yes.

Q. Have you made such a search? A. Yes, sir.

Q. When did you make that search? A. Well since the bookkeepers have been down there, the expert accountants, I have been repeatedly asked to look for letters and such things. I have always done so, and whatever I have found I have turned over to them.

Q. Well, didn't you have a request about two weeks ago to make a search for cables? A. Yes, sir.

Q. Did you make a search? A. Yes, sir, I did.

1704 Q. What did you find? A. I don't remember of finding anything. Through the general files, I looked and in the different places where I was asked to look.

Q. What did you do to find these papers? A. I looked in the general files in which the cables or letters should have been.

Mr. Elkus: I move to strike that out.

The Special Commissioner: He means where they have been accustomed to put them.

Mr. Larkin: There is no other place to look except there.

Q. What did you find? A. I didn't find any- 1705
thing.

Q. Did you find any cables or letters? A. No,
sir.

Q. Between Manchester and New York? A. No,
sir.

Q. Now, as a matter of fact, you knew that cables
were sent during the month of October between
Manchester and New York?

Mr. Elkus: I object to that as leading.

By the Special Commissioner:

Q. Do you know? A. No, sir.

Q. You do not recollect any? A. No, sir. 1706

By Mr. Larkin:

Q. What made you hesitate in saying that you
did not recollect? A. I will explain myself a little
further. I was really the man that had charge of
the filing. Anything that I done like that was
just merely because there wasn't a regular boy
there to do it or some such thing as that. When-
ever I was asked to copy a cable or any other thing
like that, I copied it and it went in the general
files, so far as I know.

Q. Well, you copied all the letters and cables? 1707
A. No, sir.

Q. Who did copy them? A. There were dif-
ferent boys in the office that done that and were
supposed to do it.

By the Special Commissioner:

Q. Who else besides you? A. Well, there have
been so many I really couldn't tell.

By Mr. Larkin:

Q. Were there many in October, 1907? A. In
October there was a young fellow named Anderson

1708 and another boy by the name of Smith and another by the name of Cook. They were all supposed to do copying of the letters and so on.

By the Special Commissioner:

Q. You saw them sometimes copying letters and cables? A. Yes, sir.

By Mr. Larkin:

Q. Cook and Anderson would put the cables in the usual places, wouldn't they? A. Yes, sir.

Q. And the letters would go in the usual places as well? A. Yes, sir.

1709 Q. Just look at that book, Robert, and tell me what it is?

Mr. Elkus: I object to that—to having this witness characterize a paper. It is incompetent, immaterial and irrelevant.

By the Special Commissioner:

Q. What kind of a book is it? A. That is a file.

Q. Is that one of the files? A. Yes, sir; it is a regular copying file.

Q. Of letters? A. Letters received and copied, yes, sir.

1710 By Mr. Larkin:

Q. That is the regular file? A. Yes, sir.

Mr. Larkin: This is produced in the possession of the receiver. I would like to have it marked for identification.

Marked Receiver's Exhibit 72 for identification.

CROSS-EXAMINATION BY MR. ELKUS:

Q. When you were first asked to look for any papers—when was that? A. Well, it appears to me it must have been about three weeks ago.

Q. Three weeks ago? A. Probably three weeks 1711 ago. I am not quite sure of it.

Q. And you knew of this book which has been shown you? A. Yes, sir.

Q. Did you give that to Mr. Cook? A. I don't know. I will not say that I did.

Q. Did you find it? A. That is a general file.

Q. Did you find it? A. I couldn't say.

Q. You know it was there? A. Yes.

Q. When the receiver came in? A. Yes, sir.

Q. And whether you took it out or not, somebody took it away after the receiver came there? A. Yes, sir.

Q. If any papers have been taken away—none 1712 have been taken away except by Mr. Larkin or Mr. Cook? A. No, sir.

Mr. Elkus: I move to strike out all this testimony as immaterial and irrelevant.

The Special Commissioner: Motion denied.

Mr. Elkus: Exception.

Mr. Larkin: That is all I will have with this witness.

Mr. Elkus: I offer in evidence the original drafts—four drafts drawn by Kessler & Company of New York on Kessler & Company of Manchester, each for £5,000, and each dated August 27th, 1907. These are the original drafts and the notices of protest. I offer those four in evidence, and I offer in evidence notice of protest of each draft which is affixed to it. 1713

Mr. Larkin: I object to the notice of protest.

Mr. Elkus: Or the certificate of protest I suppose it should be called.

Mr. Larkin: I object to the certificate of protest.

Mr. Elkus: Well, we will admit they are not paid.

Mr. Larkin: I make no objection to them as evidence of acceptance of these drafts by the Man-

1714 chester house. I will ask the counsel to concede that these drafts have not been paid by the Manchester house.

Mr. Elkus: I will concede that if you will admit those in evidence.

Mr. Larkin: I will admit them in evidence.

Received in evidence and marked Kessler & Company, Limited, Exhibits V, W, X and Y, respectively.

ALFRED KESSLER, recalled by the Receiver.

By Mr. Elkus:

1715

Q. You have seen these four drafts which have just been put in evidence. Are those the four drafts of £5,000 each, which were drawn August 27, 1907, and for which the special so-called escrow of \$20,000 was set aside in favor of Kessler & Company of Manchester? A. Yes.

By Mr. Larkin:

Q. One of your customers was the Anglo-Foreign Banking Company, wasn't it? A. Yes.

Q. And their office was in New York? A. No, in London.

1716 Q. Do you know George Weiss? A. No, except he has been in the office a good deal.

Q. He has been in the office? A. I mean he has been in lately. I never knew him before, except the name; I have seen the name.

Q. Do you recollect that George Weiss bought some exchange in favor of the Anglo-Foreign Banking Company, on the house of Manchester—the Manchester house? A. I understand he did.

Q. And that Weiss was in business at 105 Hudson Street, New York? A. Only that I know Weiss was in and he claims to have some drafts.

Mr. Elkus: I object to what he claims and move 1717 to strike it out.

The Special Commissioner: Strike it out.

Q. You know that Mr. Weiss has been a business man in this city, do you not? A. Yes, sir.

Q. And from time to time he had purchased drafts from your house? A. Yes.

Q. And you do know, do you not, that he holds a draft which he purchased to the order of the Anglo-Foreign Banking Company?

Mr. Elkus: I object as incompetent, immaterial and irrelevant.

The Special Commissioner: What drafts are you 1718 referring to?

Mr. Larkin: To all the drafts which are unpaid and accepted by Kessler & Company.

The Special Commissioner: I don't suppose he can testify in a wholesale manner without looking at the memorandum.

Mr. Larkin: I am taking one—George Weiss. I am asking him whether he knows about him.

By the Special Commissioner:

Q. What do you know about him? A. I don't know much about him.

Q. Who is George Weiss? A. He is a man—a 1719 merchant who has bought our bills.

Q. Here in New York? A. Yes; but what bills he is alluding to I don't know. Mr. McLean could tell you about it. He is the man who knows the bills.

Q. He can? A. Yes.

Q. Who is it drawn on?

Mr. Larkin: The Anglo-Foreign Banking Company.

1720 By Mr. Larkin:

Q. Now, look down that list and tell me which ones of them you know yourself? A. Well, I know about these (indicating) 5,000 and 5,000 and 5,000.

Q. Those are the Coates' drafts? A. No, they went to the Union Discount.

Q. What drafts are they? A. W. L. S. Jackson & Company.

Q. Just look down the drafts? A. I know about Uhlfelder & Thompson. I know about John Munroe. I know about the Anglo-South American and the Coates. Those little amounts—I don't know these two (indicating).

1721 Q. The two little ones? A. No, I don't know them.

Q. Mr. Kessler, do you remember the purchase by the Colonial Bank of a draft by Kessler & Company of Manchester for £5,000 on the 16th day of October, 1907. A. Yes.

Q. The Colonial Bank is in business in this city? A. Yes, they have an office here.

By Mr. Elkus:

Q. Are they in business here? A. They have an office here.

1722 Q. Where is it located—the main office? A. I don't know.

Q. Is it an English bank? A. No.

By Mr. Larkin:

Q. It is 82 Wall Street, isn't it?

Mr. Elkus: I object to that. This witness cannot give the nationality or a local status to a bank by testifying about it.

By the Special Commissioner:

Q. Where is the office of the Colonial Bank that you dealt with? A. I don't know.

Q. You don't know? A. I say I don't know. 1723

Q. Don't you know it is in Wall Street? A. There is one here. There is a branch house here.

Q. Where is that? A. I don't know; but he says it is 82 Wall Street. I dare say it is.

By Mr. Larkin:

Q. Does anybody in your office know? A. Oh yes. All the office boys would know and Mr. McLean would know.

Q. Well, now, can you state whether or not the draft of £5,000, dated October 16th, 1907, was purchased in this city by the Colonial Bank from you?

Mr. Elkus: I object to that as calling for the witness's conclusion. 1724

By the Special Commissioner:

Q. Do you know where it was purchased? A. I know where it was paid for. It was paid for here.

By Mr. Larkin:

Q. Now, do you know where the drafts to the order of Jackson & Company, which were dated September 24th, 1907, for £5,000 each—where they were purchased and paid for?

Mr. Elkus: Objected to as incompetent, immaterial and irrelevant. 1725

The Special Commissioner: I think it is relevant.

Mr. Elkus: Exception.

The Witness: They were paid for here, but they were purchased by the Union Discount Company.

By Mr. Elkus:

Q. That is the Union Discount Company of London? A. Yes.

By the Special Commissioner:

Q. They have a branch here? A. No.

1726 By Mr. Larkin:

Q. Mr. Kessler, you weren't asked that? A. You asked me——

Mr. Larkin: I move to strike out what he said about the Union Discount Company as not responsive. I asked him whether it was paid for here. Then he proceeds to volunteer something that he could not possibly know anything about.

The Witness: I do, because there was a cable.

The Special Commissioner: You can strike it out.

Mr. Elkus: Exception.

By Mr. Larkin:

1727 Q. Now, these drafts of £5,000 each, four of them, amounting to \$96,050, were paid for by Jackson & Company here in this city? A. Whether they were paid for by Jackson or not, I can't say.

Q. They were paid for in this city? A. They were paid for.

By the Special Commissioner:

Q. Here in New York? A. Yes.

By Mr. Larkin:

Q. And the drafts were delivered here in your office? A. They were delivered in the office.

1728 Q. Now, do you know about the drafts of £2,500—six of them—to the order of Uhfelder, Thompson & Company? A. Yes; they are the same, practically, as the others.

Q. Was the money for those drafts paid here in this city? A. Yes.

Q. And the drafts were delivered here? A. And the drafts were delivered here.

Q. And that was on September 16th, 1907, was it? A. Well, I don't know the date.

Q. Well, was it about that time? A. I dare say.

Mr. Elkus: This is all taken subject to my same 1729
objection and exception?

The Special Commissioner: Yes.

Q. Do you know when those drafts matured and became payable? A. No, not from memory.

Q. Do you remember that there were \$71,962.50 of liabilities maturing on the 25th day of September, 1907? You remember that fact, don't you?

Mr. Elkus: I object to that as calling for a conclusion and not a fact.

No ruling.

Q. You remember, do you not, that there were certain drafts that had come up on the 8th of November? A. Yes. 1730

Q. And the next drafts they had to meet were on the 23rd day of December? A. I don't remember the exact dates. There was something on the 8th of November.

Q. Do you recollect that these were the drafts which matured? A. No, I don't know which were the drafts.

Q. Do you know the banking house of John Munroe & Company, of this city? A. Yes, sir.

Q. Do you remember selling them drafts of 5,000 pounds each, amounting to \$47,980, on or about September 13, 1907? A. Yes. 1731

Q. That money was paid to you here and the drafts were delivered here? A. Yes.

Q. Do you remember those drafts were sold on September 13th, 1907? A. I don't know.

Q. About that time? A. I suppose so.

Q. And they were payable at Manchester on December 23rd last of this year, 1907? A. If they were drawn—

Q. Ninety days' drafts, weren't they? A. Yes.

Q. Do you remember whether the drafts sold to Munroe was a ninety-day draft? A. No, it may have been sixty.

1732 Q. Now, it was either ninety or sixty? A. Yes.

Q. The books would show what the fact was?
A. Yes, sir.

Q. Do you remember the sale of four drafts of 2,500 pounds each to the order of the Anglo-South American Banking Company? A. Yes.

Q. Amounting to \$48,780? A. Yes.

Q. That those drafts were dated July 31, 1907. Do you remember receiving the money here in this city and delivering the drafts here? A. They did receive the money.

Q. And you did deliver the drafts here in this city? A. Yes.

1733 Q. You don't remember the date that those drafts were delivered definitely? A. No.

Q. July 31, 1907? A. No.

Q. And you don't remember that they became payable at Manchester on the 11th of November? A. No, only since there was talk about it I remember there was something due on the 11th of November.

Q. I show you four certain drafts, dated July 31, signed by Kessler & Company, to the order of the Anglo-South American Bank, Limited, in the sum of 2,500 pounds sterling, and ask you whether those drafts were delivered here in this city? A. They were delivered in this city.

1734 Q. And you received the money for them here? A. Yes.

A. And the date is the 31st of July, 1907? A. Yes.

Q. And they became payable on the 11th of November, 1907? A. Yes, about.

Mr. Elkus: I offer in evidence the four original drafts and the acceptances endorsed thereon, and the certificates of protest attached thereto, drawn by Kessler & Company, of New York, each dated July 31, 1907, on Kessler & Company, of Manchester, to the order of the Anglo-South American Bank,

Limited, and each for 2,500 pounds, and accepted 1735
the 12th day of August, 1907, payable at Lloyds
Bank, Limited, Lombard Street, London, signed
"Kessler & Company, Limited, by H. Kessler, Di-
rector." I will offer in evidence those papers.

Mr. Larkin: I object to the certificate of protest
on the ground it has nothing to do with Kessler &
Company of New York—incompetent evidence as
against Kessler & Company, of New York.

The Special Commissioner: I will allow it.

Mr. Larkin: Exception.

Mr. Elkus: The certificate of protest is attached
by William Crawley, Notary Public, under seal,
dated November 13th, that he duly protested this 1736
note for non-payment against the drawers and ac-
ceptors, and such certificate is attached to each
draft.

(Received in evidence and marked, respec-
tively, Kessler & Company, Limited, Exhibit
Z, AA, BB and CC.)

It is stipulated that copies may be used in-
stead of the originals of such drafts.

It is conceded that the foregoing drafts have
not been paid.

Mr. Elkus: I offer in evidence a draft drawn by
Kessler & Company of New York, dated October 1737
15th, 1907, for 5,000 pounds, to the order of the
Colonial Bank of London, England, and the en-
dorsement thereon and the acceptance thereof.

Received in evidence and marked Kessler &
Company, Limited, Exhibit DD.

It is admitted that the foregoing draft is not
yet due and not yet paid.

By Mr. Larkin:

Q. Your recollection has been refreshed by look-
ing at these drafts purchased by the Anglo-South
American Company, and you can say now that the

7138 money was paid into your office and the drafts delivered here? A. Yes.

By Mr. Elkus:

Q. As to these drafts which are not yet due and not yet paid, you knew of their not being paid when presented? A. Yes.

Mr. Larkin: I object to that—what he knew about it—as not proper cross-examination.

The Special Commissioner: He might have some notice.

Q. Have you notice of them not being paid? A. I only had verbal notice.

1739 Q. That they had not been paid and had been protested for non-payment?

Mr. Larkin: I object to that.

The Special Commissioner: I shall hold that Kessler & Company had not been charged as endorsers or makers of the notes. Objection overruled.

Mr. Larkin: Exception.

By Mr. Larkin:

Q. You have seen the drafts dated August 27th, 1907?

1740 Mr. McLoughlin: Our stipulation in regard to the non-payment of these drafts is that the drafts were not paid at maturity.

Mr. Larkin: Have not yet been paid?

Mr. McLoughlin: So far as we know, they have not been paid.

Q. To the order of J. & P. Coates, Limited, due November 6, 1907—four of them for 5,000 pounds each? A. Yes.

Q. Do you know that the money was turned over to you at about the date the exchange bears date or the day after? A. Yes, sir.

Q. And the bills of exchange were delivered about the same time? A. Yes.

Q. I show you what purports to be copies of 1741
cables which have passed between your house and
Manchester, and between you and Flinsch while
abroad, and ask you to look at them and see whether
after your recollection is refreshed by looking at
them whether you are able to state which of the
cables you recollect having sent or received, as the
case may be. Take the first one. Look them all
over first, and then, after you have looked them over
carefully, please answer the question?

Mr. Elkus: I object, unless it is shown we have
got the original cables.

The Witness: Now, this first cable—part of it I 1742
remember. The other part of it, I don't know any-
thing about. That is probably something that Nes-
tle put in.

Q. Read the part of the cable that you remember?

Mr. Elkus: I object to that. Who was it sent by?

The Witness: It was sent to Flinsch.

Mr. Elkus: I object. It is in no way binding upon
us. It is incompetent, immaterial and irrelevant,
and not the proper way of proving any fact.

Objection overruled. Exception.

Q. Do you remember that cable dated October
3, 1907, Mr. Flinsch? A. Yes. 1743

Q. Do you remember sending it? A. Yes.

Mr. Elkus: He says he remembers part of it.

The Witness: I remember part of it.

Q. Just read that part of the cable that you re-
member?

Mr. Elkus: I object to that as incompetent, im-
material, irrelevant and not a proper way of put-
ting the cable in evidence.

Q. Do you remember receiving a cable on or
about the 8th day of October, 1907, from Man-

1744 chester? A. No. That wasn't to me. That was to Henry Kessler.

Q. Do you remember seeing it? A. Yes he showed it to me.

Q. Henry Kessler showed to you a cable received by him from Manchester. Are you able to state what the substance of that cable was?

Mr. Elkus: I object to that.

Q. Do you remember the cable received by Henry Kessler? A. No, I don't remember the wording of it. I don't remember. I remember he showed me a cable.

1745 Q. Will you please look at this (showing paper to witness) and see whether that refreshes your recollection whether that is the cable that was sent to Henry Kessler? A. Yes; I guess that is the cable.

Q. Now, just read the cable that you received addressed to Henry Kessler? A. I didn't receive it. Henry Kessler received it.

Q. Don't you know that Henry Kessler was in Atlantic City at that time? A. No, I don't know. Was he?

Q. Don't you remember sending down that cable to Henry Kessler at Atlantic City? A. Well, yes, I suppose—I dare say I do.

1746 Q. That is your recollection of it now? A. There was a cable sent, yes.

Q. Is that the cable you now recollect? A. Yes, I suppose it is.

Q. Just read that cable?

Mr. Elkus: I object to it being read in evidence as incompetent, immaterial and irrelevant.

The Witness: I opened it. It was addressed to Henry Kessler—because he was away, and I didn't know whether he had a cable code with him, and so I opened it, translated it and then sent it on to him where he was, evidently. Philadelphia, evi-

dently, because I say, "Henry Kessler, Philadel- 1747
phia."

The Special Commissioner: What is the date of that?

Mr. Elkus: October 8th.

The Special Commissioner: I think it is admissible.

Mr. Elkus: I except.

Q. Now, I want to prove by you that you did receive that, that you translated it, and, having translated it, you sent it on to Henry Kessler.

The Special Commissioner: That is the fact, is it, Mr. Kessler?

1748

The Witness: Yes, if that is the cable, I suppose it is the fact.

The Special Commissioner: Read it over and see.

Mr. Elkus: I may have my exception to that being read on the record as incompetent, immaterial, irrelevant and not the proper way of proving it?

The Special Commissioner: Yes. You can read it.

The Witness (Reading): "8th of October, 1907. Henry Kessler. Flinsch here 12 A. M. Their position not at all satisfactory. Please consult A. K. Would advise selling stocks. Are trying here to arrange loan against Orleans Cripple. Success 1749
doubtful. Do not approve of more Manchester. What is best that can be done?"

By Mr. Larkin:

Q. Now, did you send any reply to that cable?

A. Yes, this was sent (indicating paper).

Q. And what date? A. The same date.

Q. What reply did you send, if you recollect?

Mr. Elkus: I object to that. Whether Mr. Alfred Kessler sent a reply is incompetent, immaterial

1750 and irrelevant. What reply this witness sent cannot bind us.

The Special Commissioner: He sent to Kessler & Company—it would be notice to you. This is a telegram from Kessler, of New York, to Kessler, of Manchester.

Mr. Elkus: In that view, it might be.

The Special Commissioner: I think I will allow it.

Mr. Elkus: Exception.

Mr. Larkin: Please read it.

The Witness (Reading): "Henry Kessler, Philadelphia. We have arranged balance Orleans.
1751 Flinsch's father should help."

Q. Flinsch's father at that time was a debtor to your house, wasn't he?

Mr. Elkus: That is objected to as incompetent, immaterial and irrelevant.

The Special Commissioner: I don't see why it is relevant.

Mr. Larkin: For the reason, your Honor, that I am going to show by the letters that Manchester was entirely familiar with the financial conditions of the New York house, that this is one fact that Flinsch's father should help—that shows that Manchester—that New York informed Manchester that
1752 the New York house was in need of assistance and gave a reason why the assistance should come from Flinsch's father, Flinsch at that time being in Manchester. I am proving by hundreds of little details of that kind an intimate knowledge of the New York house.

The Special Commissioner. Very well; I will allow it.

Mr. Elkus: Exception.

The Witness: Yes.

Q. Now, I call your attention to a cable dated October 16, 1907, to Rudolf Flinsch at Frankfort. Do you remember sending that?

Mr. Elkus: I object to any cables to Rudolph Flinsch at Frankfort on the same grounds as before. 1753

Objection overruled. Exception.

Q. Do you remember sending it? A. Yes.

Q. Just read it.

Mr. Elkus: Same objection to it being read.

Same ruling. Exception.

The Witness (Reading): "Blackmer will not act. Taylor will act. You must be present."

Q. Now, that referred, didn't it, to a pending arbitration which was to take place regarding the questions in dispute between Gillette, yourself and Mr. Flinsch? 1754

Mr. Elkus: Objected to as incompetent, immaterial and irrelevant. The arbitration, if it was in writing, is the best evidence. It is entirely immaterial as to us.

Objection overruled. Exception.

The Witness: Yes.

Q. You had been in conference with Mr. Gillette, had you not, on the subject of who should act as arbitrators in the controversy?

Mr. Elkus: I object to any consultation between this witness and Gillette not in the presence of Manchester. It is incompetent, immaterial and irrelevant. 1755

The Special Commissioner: You offer it as bearing upon the witness's prior testimony?

Mr. Larkin: Certainly.

The Special Commissioner: You may take it in that view.

Mr. Elkus: Exception.

Q. (Question repeated as follows: You had been in conference with Mr. Gillette, had you not, on

1756 the subject of who should act as arbitrators in the controversy?)

Mr. Elkus: Same objection.

Same ruling. Exception.

The Witness: Not much. I spoke to him about it one day, and that was all, and he had named Mr. Byrne to represent them in the arbitration, and we named Taylor.

Q. Well, you had questions that had to be settled, had you not?

Same objection. Same ruling. Exception.

1757 A. No, no. A dispute with Gillette.

Q. Did the Manchester house write to you that Gillette was drawing too high?

Mr. Elkus: If it is a letter, that letter is the best evidence.

Mr. Larkin: I am refreshing the witness's recollection.

The Special Commissioner: He says he does not recollect.

The Witness: I don't know.

Q. What were the points in dispute between you and Gillette?

1758 Mr. Elkus: Objected to as incompetent, immaterial and irrelevant, in no way concerned with Kessler & Company of Manchester.

The Special Commissioner: I think you have gone far enough with that.

Mr. Larkin: I simply want to show briefly that they were substantial matters.

The Special Commissioner: Mr. Flinsch's testimony shows that. That is his testimony as to what happened between Gillette, and is already in evidence.

Mr. Larkin: Yes. I simply want, if I am allowed, to bring it down as near the 25th as I can.

Q. Did you see Mr. Gillette after October 16 on 1759
this same subject?

Same objection. Same ruling. Exception.

The Witness: No.

Q. Do you mean to say this is the last time,
October 16, you saw Mr. Gillette? A. Until I wrote
him the letter. We named Taylor. He wrote me
a letter and named Byrne, and I named Taylor.

Q. You saw him at that time? A. No; he was
up at the Belmont and I sent Robert up with a
paper to sign, which he signed, for the prolonga-
tion of the arbitration—make it take place two
weeks later, so that Flinsch would be back. 1760

Q. I call your attention to a cable on the 25th of
October, 1907. Do you remember having seen that
cable? A. No.

Q. Sent to Kessler & Company of Manchester?
A. Well, I don't remember that cable. There was
a cable that Henry Kessler sent.

Q. Do you remember speaking to Henry Kess-
ler about it before it was sent? A. I might have
talked to him about Lloyd's Bank.

Q. Why would you talk to him about Lloyd's
Bank? A. Well, because originally Lloyd's Bank
used to be a firm named Cunliffe-Brooks, and they
are great friends of ours altogether, and when they 1761
were taken over by Lloyd's Bank in Manchester,
I thought that Henry Kessler could probably get
a loan on anything better than I could myself, and
that is the reason——

Q. Then, that part of it suggesting an arrange-
ment with Lloyd's Bank for cash loans against
Cripple Creek was your suggestion, wasn't it? A.
Yes.

Q. And it was added by him on this cable? A.
Yes.

Q. Now, do you remember receiving a cable from
Kessler & Company of Manchester that morning

1762 or during that day, or whether M. Henry Kessler received it? A. No, I don't.

Q. You notice this cable begins, "Yes, have secured escrow." Now, calling that to your attention, don't you remember whether or not the cable making that inquiry came in that morning? A. No.

Q. You don't remember? A. No.

Q. Now, I call your attention to a cable dated October 25, 1907, to Rudolph Flinsch. Do you remember sending that?

Mr. Elkus: That is the same objection as before, incompetent, immaterial and irrelevant.

1763 Same ruling. Exception.

Mr. Elkus: What date is this?

Mr. Larkin: October 25.

The Witness: Yes, I sent that.

Q. Do you remember it? A. Yes.

Q. Did you send that cable or direct it to be sent?

Same objection. Same ruling. Exception.

The Witness: I don't remember whether that is the date or not.

Q. October 25.

1764 Mr. Elkus: I will object on the further ground that this is repetition.

Mr. Larkin: No, this witness's testimony has never been taken on the subject of these cables at all.

The Special Commissioner: I cannot now recollect whether it has or not. You disagree as to that. I will have to take the testimony.

Mr. Elkus: I object to it being read as incompetent, immaterial and irrelevant, not the best evidence, and the original cable is here.

The Special Commissioner: Where is it?

Mr. Larkin: It is up in my office, locked up in

my safe.

1765

The Special Commissioner: Has it been put in evidence?

Mr. Larkin: Yes. The Flinsch cables he has produced—he has found those, the originals.

The Special Commissioner: Have they been put in evidence?

Mr. Larkin: No, they have not been put in evidence.

The Special Commissioner: Put it in now.

The Witness (Reading): "Financial affairs critical. Cannot sell demand. Central Trust has made a call loan \$100,000. We require Marks One Million October 28. Can you obtain."

1766

By Mr. Larkin:

Q. That is one of the cables that you recollected to have sent to Flinsch in the early part of your examination? A. Yes.

Q. Do you remember? A. Yes.

Q. Now, did you not testify then that you also sent him a cable on Sunday from Tuxedo? A. I have forgotten.

Q. Don't you now recollect the fact that you sent a cable prior to Sunday from Tuxedo? A. Yes.

Q. And this cable was sent on the 25th of October? A. Yes.

1767

Q. That is correct? A. If that is the date, I don't know.

Q. You sent a cable, as you testified on your former examination to Mr. Flinsch from Tuxedo? A. From Tuxedo?

Q. On Sunday? A. Yes.

By the Special Commissioner:

Q. On the 25th you sent the cable? A. Yes; I don't know the date.

Q. But you did send such a cable? A. Yes.

Q. During that week? A. Yes.

1768 Q. Prior to Sunday? A. Prior to Sunday.

By Mr. Larkin:

Q. Now, I call your attention to a cable dated October 26th, 1897, sent to Kessler & Company, Limited, of Manchester. Please read it over and see if you remember having sent such a cable? A. I remember sending that.

Q. Just read it?

Mr. Elkus: I object to it on the ground that it is after the 25th of October, 1907, and therefore is incompetent, immaterial and irrelevant. For that reason specifically.

1769 The Special Commissioner: Because it is after the 25th?

Mr. Elkus: Yes, sir; it is the 26th.

Objection overruled. Exception.

The Witness: (Reading): "Large amount. Are trying here Cripple 60 Nominal."

Q. That was an answer to a cable that you received from Manchester? A. Probably, yes.

Mr. Elkus: Probably? I object to probabilities and move to strike out that answer.

By the Special Commissioner:

1770 Q. Is there any doubt of it Mr. Kessler? A. I think they were asking how much we needed, and I said "Large amount." Large amount—anything over £20,000.

Q. Was there anything else in the cable sent?

Mr. Elkus: I object to that as incompetent, immaterial, irrelevant, unless the witness knows what is was.

The Witness: I don't remember what the cable was. I don't remember whether the cable was sent to us or to Mr. Henry Kessler.

Q. But this cable was sent to Manchester, you see? A. Yes. 1771

Q. And Mr. Henry Kessler was in Manchester on the 26th of October, 1907, was he? A. No.

Q. Mr. Henry Kessler was in New York, wasn't he? A. Yes.

Q. Now, you recollect this reference in that cable of October 25, 1907, to Kessler of Manchester: "Have secured escrow. Financial affairs critical?"

A. No, I don't remember anything about that. I only remember something about Lloyd's Bank.

Q. And you mean to say you never saw the first part of that on the 25th of October? A. No.

Q. Can you state when was the last time you saw the cable from the Manchester House to which the cable of October 26th to Manchester was the response? A. No. 1772

Q. You haven't seen it within the last month or so? A. No.

Q. Do you remember a cable sent to Manchester on the 29th of October, 1907? A. I don't remember that cable at all. I think Henry Kessler must have sent that.

Mr. Elkus: I object to what Henry Kessler must have done and move to strike it out.

Motion granted.

1773

Mr. Larkin: Exception.

Q. Just look at it again, Mr. Kessler.

(The witness does so.)

The Witness: I think, if I remember right, that I told Mr. McLean to cable something to that effect. I don't remember seeing the cable. Mr. McLean would be able to tell you about that. Probably it would be in his handwriting.

Q. You notice that the cable says that "Our position will be referred to Morgan to-night?"

1774 Mr. Elkus: I object to this—any contents of this cable being put in evidence, directly or indirectly—incompetent, immaterial and irrelevant, and particularly upon the ground that it is October 29th, four or five days after Mr. Henry Kessler had changed the securities, put them in a separate vault.

The Special Commissioner: I have admitted considerable testimony as to what happened on the—prior to the 24th, on the 24th and on the 25th, 26th, 27th, 28th and 29th, down to the 30th. I have doubts as to its being relevant or competent, but I think it safer to admit it and give you an exception.

1775 The Witness: Yes, I notice that.

Q. You told McLean to cable that, didn't you? A. Probably—I think I did.

Q. Are you quite sure that you told McLean to also incorporate in this cable the words "escrow collateral unchanged."

Mr. Elkus: Same objection.

Same ruling. Exception.

The Witness: No, I don't remember that. I don't know anything about it.

Q. Did you tell McLean that your failure was imminent at that time?

1776 Same objection. Same ruling. Exception.

The Witness: I don't know. I don't remember what I said. I told him to cable.

Q. Isn't it a fact that that cable was sent by Henry Kessler? A. I don't know. No.

Q. Isn't it your best recollection now? A. On second thought, I don't think that Henry Kessler had anything to do with that cable. I think I was going on to Tuxedo and I told McLean to send the cable.

Q. That was Tuesday, the 29th. You say you were going to Tuxedo? A. I was living at Tuxedo.

By the Special Commissioner:

1777

Q. You went up every day?

By Mr. Larkin:

Q. How could you be at Tuxedo if you were going to refer your position that night to Morgan?

By the Special Commissioner:

Q. You came in on the 28th into the city? A. Yes.

By Mr. Larkin:

1778

Q. That is the night you had dinner with your cousin at the Hotel Gotham, wasn't it? A. No.

By the Special Commissioner:

Q. What is your recollection? A. The night of the Gotham, I don't know, but you have got it down. I think Mr. Henry Kessler had it. I don't know.

Q. You had returned from the City of New York, and you were not at Tuxedo on the 29th of October. Will you state that? A. I returned on the Monday from Tuxedo, whatever day that was.

Q. When is it you got back from Tuxedo? A. On the Monday.

1779

Q. What date? A. 28th.

Q. Are you sure you did not get back a week earlier? A. Yes.

Q. And didn't you hear your cousin testify that you came and dined with him most unexpectedly at the Hotel Gotham and you had arrived from Tuxedo and came in unexpectedly to dine with him on the 21st? A. I didn't say unexpectedly, because I called him up.

Q. You will now state, will you, that you were in New York on the night of October 29th? A. Yes.

Q. And you expected to have your financial mat-

1780 ters before Mr. Morgan on that night. Is that right?

No answer.

Q. Didn't you say that? A. It doesn't matter what you say in the cable. The words are shorter.

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant—what his expectations were.

Objection overruled. Exception.

Q. I call your attention to the language in your cable that your affairs would be referred to Morgan that night. Do you wish to say that you told Mr. McLean to send such a cable as that?

1781

Same objection. Same ruling. Exception.

A. I don't know whether I said those express words. I left it to McLean.

Q. Did you tell McLean that your failure was imminent?

Mr. Elkus: Same objection.

Same ruling. Exception.

A. Probably.

Q. I don't want probabilities. I want to know what the facts is. Isn't it a fact that you prepared that cable yourself? A. No.

1782 Q. Is it a fact, then, that Mr. Henry Kessler prepared the cable. A. I don't think so.

Q. Well, if you didn't prepare it and Henry Kessler didn't prepare it, then you say McLean prepared it at your direction? A. Probably.

Q. Now Mr. Kessler I show you a list of the collateral which were in the escrow, so called. Will you please look at it? A. I know it pretty well by heart.

Q. Now, were there any dividends or coupons paid on any of that collateral? A. Since our failure?

Q. No; during the time—since June 30th, 1903?

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant. 1783

Objection overruled. Exception.

By the Special Commissioner:

Q. What is the fact? A. Well, we collected the coupons and interest whenever they were due.

By Mr. Larkin:

Q. What did you do with them?

Same objection. Same ruling. Exception.

A. We credited them under the stock account of Daimler Manufacturing—whatever it was—the United Brewery Bond account. 1784

Mr. Elkus: I take an exception to all this.

By the Special Commissioner:

Q. It went into your bank account, didn't it? A. Yes.

By Mr. Larkin:

Q. And that is so in the case where any part of the principal of a note, for instance, was paid off. You would credit the maker of the note with the amount paid and the money would find itself eventually into your bank account. 1785

Same objection. Same ruling. Exception.

A. Yes.

Q. And that is so whether it was notes or bonds or stock or anything? If there were any dividends or coupons paid or any money paid on account of principal, you would credit the necessary account and it would eventually find itself into your bank account. Is that right?

Same objection. Same ruling. Exception.

A. Yes.

- 1786 Q. Can you state, Mr. Kessler, under what heads these various securities will be found or carried in your books of account?

Mr. Elkus: I object to the question. He says "Carried in their books of account." If he means where these securities are referred to in the books, I have no objection to that question—in the books.

The Special Commissioner: Why don't you modify your question?

Mr. Larkin: I haven't the slightest objection.

Q. Can you state under what heads these various securities are referred to in your books of account?

- 1787 Mr. Elkus: I object to it as incompetent, immaterial and irrelevant and not the proper way of proving any such alleged fact, if it is a fact.

Objection sustained. Exception.

Recess until 2 o'clock.

AFTER RECESS.

By Mr. Larkin:

Q. I want you to refer to the account, if there is one, with Kessler & Company of Manchester.

Mr. Elkus: In the ledger?

- 1788 Mr. Larkin: Yes.

The witness does so.

Q. These dividends went into your account and were not debited or credited in any way to the account of Kessler & Company of Manchester?

No answer.

Q. The balance sheets, Mr. Kessler, which were made up from time to time, were forwarded to the Manchester house, weren't they? A. Yes, I would send a copy of them.

Q. You sent a copy of them every time they were made up? A. Yes.

Q. And that was every year or twice a year? A. 1789
No, only once a year.

Q. At the end of December? A. You see, it always took us about three or four months to make out a balance sheet, because we had to wait so long for foreign accounts.

Q. Now, Mr. Kessler, in some of your letters to Manchester, when you wrote them about the changes in escrow, you wrote, "We have sold so and so" and "We have replaced it by so and so." Do you remember? A. Yes.

Q. And in some instances you said, "We have taken such and such securities out and put in other securities"? A. Yes.

1790

Q. Was there any reason for the use of the last language—the latter language? A. No, nothing special. I think where we sold the securities, I put "sold." We simply took them out and used them in some other loan or used—and when we changed the collateral I just put "replaced."

Q. That would be the explanation for that change of language, would it?

Mr. Elkus: I object to that. The letter speaks for itself.

Objection overruled. Exception.

A. Yes.

Q. So that in some instances the securities were sold from time to time and naturally other securities replaced those sold? A. Yes.

1791

Q. In some instances you took securities out and put them in another loan and replaced those securities taken out by new securities in to the Manchester escrow. Is that correct?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant.

The Special Commissioner: What is the question?

Question repeated.

1792 Mr. Elkus: I object to it as too vague and indefinite.

The Special Commissioner: It is a little obscure, Mr. Larkin. You had better divide that up.

Q. I understand that the securities sometimes were taken from the Manchester escrow and sold?

Mr. Elkus: I object to that—to any question as indefinite as that. If you are going to say anything about securities or what was done with them, let us have what securities are referred to.

Objection overruled. Exception.

Q. Is that the fact. A. Yes, that is the fact.

1793 Q. Is it a fact that sometimes the securities were taken from the Manchester escrow and put in other loans to other concerns?

Same objection. Same ruling. Exception.

A. Yes.

Q. And in that case you supplied the securities thus taken from the Manchester escrow with other securities?

Same objection. Same ruling. Exception.

A. Yes.

Q. You took them out and sold them or you took them out and placed them in other loans?

1794 Same objection. Same ruling. Exception.

A. Took them out? Or might have held them and not replaced them.

Q. Now, Mr. Kessler, please tell me, if you will, the books which would have the daily business transactions from the 25th of October down to the 30th of October. What are the names of those books. A. The journal.

Q. I want you to refer to your books, called the journal, debtor No. 11, and state, if you please, what transactions went through your house on the 25th of October, 1907?

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant. Is this for the purpose of proving solvency or insolvency? 1795

Mr. Larkin: It is for the purpose of proving there is no change in their condition between the 25th and 30th of October—no practical change between the 30th, when the general assignment was made, and the 25th, the time when these securities—

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant; not the proper way of showing it.

The Special Commissioner: You may answer.

Mr. Elkus: Exception.

1796

The Witness: What am I to answer? Just take the books?

The Special Commissioner: What do you want to get at?

Mr. Larkin: I want to get the net result of the transactions from the 25th of October to and including the 30th of October, 1907.

The Witness: That would be very hard to say, because, you see, a lot of checks that came in were not put through.

Q. Well, I ask you—checks came in and weren't put through—what do you mean by that? A. I mean a lot of checks that came in on the 29th and 30th were not booked. 1797

By the Special Commissioner:

Q. You mean by that they were returned? A. They were returned.

Q. They were checks that— A. Were paid for exchange.

Q. Which exchange you didn't take up? A. Yes.

By Mr. Larkin:

Q. That is simply a set off, isn't it? You returned the money and the checks, therefore no

1798 business was done? A. No; the change would be booked, probably.

By the Special Commissioner:

Q. You said there were certain checks received that weren't put through the books? A. Yes.

Q. Now, what were those checks and why weren't they put through the books and what was done?

A. We returned them to the owners.

Q. Why did you return them to the owners? A. Because we saw we couldn't pull through or were not sure we could pull through.

1799 Mr. Elkus: All taken under my objection and exception.

The Special Commissioner: Yes.

Q. What transactions did these checks represent?

A. They were chiefly on exchange account.

Q. Just explain to us what transaction you couldn't put through and therefore you returned the check? A. Well, I don't know which they were. There was a whole line of them—the Bank of Montreal; there was a certain amount; Winter & Smiley, a certain amount—

Q. Take Winter & Smiley? A. He bought exchange; he used to buy exchange from us every day.

1800 Q. He bought some exchange from you? A. Yes.

Q. At a certain rate? A. Yes.

Q. And he was to give you his check for it? A. He gave us his check for it.

Q. And you returned it? A. We returned it, yes.

Q. And you returned it to him because you did not give him the exchange—is that it? A. No; we had given him exchanges.

Q. But you failed—the exchange would not be met? A. Yes. That was on the 29th and 30th.

Q. Did he return the exchange when you returned the check? A. No; he had mailed it. I suppose it has been returned since.

Q. When did you hold up the checks for the first time without putting them in the bank? A. I forget whether it was on the 29th or 30th. 1801

By Mr. Larkin:

Q. Could you, for instance, refer to any entries on this book which would show you when it was you received a check from that firm you have mentioned?

The Special Commissioner: Winter & Smiley?

Mr. Larkin: Yes.

The Witness: No; it would not be entered.

Q. Can you state when it was that you delivered the check? A. No. They evidently did not book them. 1802

Q. I call your attention to credit journal, under date of October 28th, to drafts drawn on Glyn, Mills, Currie & Company on that date, being demand drafts which were sold on that day. Do you see on that day any drafts which you remember now to have been returned?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant, and we are in no way bound by the entries in the books of Kessler & Company, and they cannot put the books in evidence in this indirect way. 1803

Objection overruled. Exception.

Mr. Elkus: I move to strike out the question put by the Referee and the answers thereto in regard to the Winter & Smiley transactions, in respect to which checks were returned, as not being consummated.

Motion denied. Exception.

Q. Can you answer that question, Mr. Kessler, as to whether, among the list of exchanges, sight drafts drawn on Glyn, Mills, Currie & Company,

1804 on the 28th, you can recollect whether the Winter & Smiley draft—

Same objection. Same ruling. Exception.

A. I don't know whether they are. Here this £10,000 I think was Bank of Montreal (pointing to an entry in the credit journal under date of October 27, 1907.

Same objection. Same ruling. Exception.

Q. I want you to take up these entries, if you will, one by one, and take the first entry of October 25th. Cash in bank at that time amounted to \$163,950, didn't it?

1805 Mr. Elkus: I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. Yes.

Q. What is the next entry?

Mr. Elkus: I object to the witness reading entries from the books as incompetent, immaterial and irrelevant; not the proper way of proving them in the first instance. In the second place, they are incompetent, immaterial and irrelevant as against us.

1806 The Special Commissioner: Are you trying to prove the entries in the books? If the books are not admitted to be the books of the bankrupt and correctly kept, you have got to call the person who made the entires and prove them by him. If you are merely trying to refresh the memory of the witness in regard to some transaction, you can ask him about the transaction. If he has any memory at all of it, then it can be refreshed by looking at the books.

The Witness: I didn't make any of use bookings.

The Special Commissioner: Do you know any of the transactions apart from the entries in the books?

Q. Look at the entries under date of October 25, 1807 1907, in the debtor Journal and see whether you recollect anything about any of the transactions whatever? A. We paid a good many coupons of the Cripple Creek, which are all down there.

Q. And the money to pay those dividends would have been therefore paid to you as bankers?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant.

No ruling.

Q. I want you, Mr. Kessler, to look though the debit side of these books? A. You cannot tell whether there were any changes. You cannot tell what the changes in the market were. You cannot tell about the exchanges. You can't tell anything about that. 1808

Q. Mr. Kessler, what entry is there under date of October 25, 1907, either in the Credit Journal or in the Debit Journal which shows either a profit made or a loss sustained?

Mr. Elkus: I object to that as calling for the conclusion of the witness and asking for a book entry not in evidence.

The Special Commissioner: You can ask him what transactions there were that he can remember.

Q. Can you remember any transactions which showed either a profit made or a loss sustained during this period, between the 25th of October and the 30th day of October, 1907? 1809

Mr. Elkus: I object to that as too remote. The 25th of October is the only date with which we are concerned and they have not proved the solvency or insolvency of Kessler & Company as of that date. It is incompetent, immaterial and irrelevant; and I specifically object that they cannot prove an alleged state of insolvency by the assignment for the benefit of creditors on the 30th of October and

1810 then endeavor by attempting to show by this witness that the condition was about the same on the 25th of October to prove insolvency as of the 25th of October. I want to make my position plain about that, so I state it at some length. They cannot go backwards in a matter of this kind, and the foundation is not sufficient either to go backward or forward.

Objection overruled. Exception.

The witness: Under date of October 25th, bills discounted by Milne, Turnbull & Company, \$9,000; profit $2\frac{1}{2}$ per cent.;

1811 Foreign drafts on Dikeman, we made $1/16$ per cent., \$4,831.45;

Lloyd's Bank, \$243.42, we make $1/8$ per cent.

Mr. Elkus: This is all taken under my objection?

The Special Commissioner: Yes.

Mr. Elkus: And my exception.

Q. Now, what is the next entry which showed a profit of any kind? A. I don't know just—on our remittance we generally charged something and took a sixteenth or something like that, but these things would only be charged at the rate.

Q. One-sixteenth on \$243? A. Yes. Then the Cripple Creek paid us so much a year for looking
1812 after their affairs—about \$2,000.00.

Q. So that for the checks which you paid on behalf of the Cripple Creek, there was no profit made? A. They gave us \$500.00 every quarter.

Q. Aside from that, there was no profit made on that specific transaction? A. No.

Q. You had received from the Cripple Creek Central money with which to meet these checks, had you not? A. Yes.

Q. Now, take the next entry—Abbe's Bank? A. Well, I think an eighth on \$58.35.

Q. Anglo-Foreign Banking Company? A. That is a cancellation of entry.

Q. No profit there? A. No. 1813

Q. Lloyd's Bank, \$243.42? A. We charged an eighth per cent.

Q. Now, under the head of "Miscellaneous"? A. There would be a balance on all of those—\$7,201.68.

Q. Under the Alliance Mortgage & Investment Company. A. They paid us \$100 a year.

Q. H. M. Blackmer's account, \$3,000.00—is that a deposit account? A. Yes.

Q. There is no profit on that? A. No.

Q. The syndicate—C. C. C. Syndicate—no profit on that? A. No.

Q. The Export Shipping Company—\$1,719—how many bills were there? A profit of \$6.00? A. Yes. 1814

Q. Three quarters per cent. on the item \$491.37, under the account of H. T. King? A. Yes.

Q. Milne, Turnbull & Company—2½ per cent. on \$211.42? A. Yes.

Q. One per cent. on \$75.75, R. B. Maclay Company? A. Yes.

Q. Milne, Turnbull & Company, 2½ per cent. on \$216.89? A. Yes. Glyn, Mills, Currie & Company—Anglo-South American and Bank of Montreal, £10,000 each. It is impossible to say whether or not there was a profit or loss.

By the Special Commissioner:

1815

Q. On that? A. Yes. That is exchange.

By Mr. Larkin:

Q. And you can't tell whether it is one or the other, and if it is, it is trifling, isn't it? A. Yes.

Q. Inconsequential? A. Yes.

Q. Now, Kessler & Company cabled—transferred—£10,000 on Glyn, Mills, Currie & Company. The same answer applies? A. Yes.

Q. Can't tell whether the exchange resulted in a profit or a loss? A. Yes.

- 1816 Q. That completes the entries for October 25?
A. That is on the debit side.

Mr. McLoughlin: We object on the ground it is an attempt to prove entries in books of account in an indirect way, and on the same grounds as before.

Objection overruled. Exception.

Q. Take the entries on the credit side, under the same date, October 25, 1907, and state whether your recollection is refreshed so that you can state about the transactions therein referred to?

Mr. McLoughlin: Of your own knowledge.

- 1817 The Witness: I don't know the transactions, of course.

Q. Is there anything in there by which you can show? This credit journal contains entries which would show a loss, if any was made? A. And profits, too.

Q. Or profits? A. Yes.

Q. Now, take up these entries, won't you, please? For instance, the foreign drafts, \$243.42. Is there a profit there, and, if so, how much? A. I can't tell what they are.

Q. Couldn't tell whether there was a profit or loss? A. No.

- 1818 Q. If it was either, it would be in a small amount? A. Yes.

Q. Now, there are certain entries here, clearances, under miscellaneous. For instance, here is a cable charged to Mr. Henry Kessler, \$3.46. Is that one of the cables we were talking about this morning? A. I suppose so.

Mr. Elkus: It is agreed on the record this is all taken subject to my objection and exception?

The Special Commissioner: Yes; that is, this testimony.

Mr. Elkus: This entire line of testimony. It is

improper, incompetent, immaterial and irrelevant, 1819 and inadmissible, and it is not the proper way of proving transactions; it is not the proper way of proving entries in the books; it is not the proper way of proving the transactions, and no proper foundation has been laid for this testimony.

Q. I want you to take this credit journal, October 25, down to October 30, 1907; run your eye over it and state, after you have looked at it, whether there was any substantial change between the 25th of October, 1907, and the 30th of October, 1907?

Mr. Elkus: I object to that question upon the same grounds as before, and upon the further 1820 ground it does not call for a fact, but for the conclusion of the witness.

The Special Commissioner: I think the latter part of that objection is good.

HOWARD B. COOK, a witness called in behalf of the Receiver, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. LARKIN:

Q. What is your business? A. I am a certified public accountant, with Haskins & Sells.

Mr. Elkus: I will admit his competency.

1821

Q. And you have been a certified public accountant for how long? A. I have been a certified public accountant for about a year and a half, but when I took the C. P. A. examination—that was about 3 years ago. I have been with Haskins & Sells for 8 years.

Q. You have been employed by the Receiver, haven't you? A. Yes, sir.

Q. Since his appointment? A. Yes, sir.

Q. And prior to that you were employed by the assignee? A. Yes, sir.

Q. And how long have you been engaged in the

1822 examination of the books of Kessler & Company?

A. Since the early part of November; that is, about the first week in November.

Q. Since the first week of November of the present year? A. Yes, sir.

Q. Have you made an examination of the books? A. Yes, sir.

Q. Have you examined, for instance, the entries in the journals, credit and debit, from October 25, 1907, down to October 30, 1907? A. I have.

Q. Are you able to state, as a result of that examination what change, if any, took place between those dates, as shown by those journals?

1823 Mr. Elkus: I object to that as incompetent, immaterial and irrelevant, calling for a conclusion of the witness, giving the contents of books which have not been put in evidence.

The Special Commissioner: I will sustain the objection, but I think you can prove by this witness, if he knows, what additional assets or what additional debts were incurred—what additional liabilities there were between that time and what—

Q. Are you able to state that? A. Not in detail.

Mr. Elkus: I have an objection to that question—the same objection.

1824 Objection overruled. Exception.

By the Special Commissioner:

Q. Were there any additional assets as shown by the books? A. No, sir; not that I could find.

Q. Were there any additional liabilities?

Same objection. Same ruling. Exception.

A. Only in this case—that liabilities might be created by increase of assets or a decrease in assets and a decrease in liabilities. For instance, the cash in bank might be reduced to pay off a loan, but—

By Mr. Elkus:

1825

Q. You mean there would be a decrease in assets and a decrease in liabilities? A. In that case, an asset would be decreased and at the same time a liability would be decreased.

By the Special Commissioner:

Q. Are there any instances of that kind.

Same objection. Same ruling. Exception.

A. Yes, sir. There is an instance of that kind—several of them—but, on the whole, we find nothing that shows an unusual loss or profit. There are some losses on stocks sold and some profits on exchange sold, or possible losses which could be determined only when the accounts with foreign banks are closed; but they all appear to be in the ordinary course of business. 1826

Q. Are they small items on both sides?

Same objection. Same ruling. Exception.

A. The items of commission would be comparatively small, although the total transactions are rather large, running up into many hundreds of thousands of pounds.

Q. The commissions? A. The commissions would run anywhere from 3-16 to 2½ or 3 per cent., depending upon the nature of the business. 1827

Q. Now, not exchange? A. No; I was speaking of everything as a whole.

By Mr. Larkin:

Q. Can you state to the Referee any figures—substantially in figures, if you can, the profits which were made, as shown by the books during that period?

Same objection. Same ruling. Exception.

A. No, sir; I cannot.

1828 Q. Can you state in figures to the Referee the losses during the same period?

Same objection. Same ruling. Exception.

A. No, sir.

Q. Could you state a figure which the profits on one side or the losses on the other would not exceed? In other words, whether the losses, for instance, by sales which you have referred to of stock, to the amount of many thousands of dollars—

Mr. Elkus: I object to that upon the ground it is mere guesswork, in addition to all other objections.

The Special Commissioner: He did not finish his
1829 question, Mr. Elkins. If he has made any calculations or additions—have you made any calculations?

The Witness: On the stocks? They stand at a certain price.

The Special Commissioner: You have made computations as to the losses on the stocks?

The Witness: Yes; just in a general way.

By Mr. Elkus:

Q. You mean your computations are simply on the losses as shown by the Stock Exchange quotations? A. According to the price at which the stock
1830 is carried on the books and the price at which it was sold. For instance, some steel stock here was sold on the 28th at 23 $\frac{5}{8}$, and I think it is carried on the books at about 33 or 35, which would show a loss of 10 to 12 points on 500 shares—a matter of five or six thousand dollars.

By Mr. Larkin:

Q. Won't you go through the books and find whether there are any sales of securities like that from the 25th to the 30th. Just cast your eye over that.

Mr. Elkus: I object to that as incompetent, im- 1831
material and irrelevant, and giving the contents of
books not in evidence.

Objection overruled. Exception.

Mr. Elkus: And that also these books, as against
Kessler & Company of Manchester, are not compe-
tent entries, and there is a person who can testify
to the transactions, being familiar with them.

Objection overruled. Exception.

Mr. Alfred Kessler: Look at the Reading, Mr.
Cook.

The Witness: I don't know definitely just at what
price this Reading here is carried. 1832

By the Special Commissioner:

Q. Don't the books show? A. No, sir.

Q. I mean aren't there books somewhere that
show? A. Oh, yes; we can find it, but I haven't
got the exact list.

By Mr. Larkin:

Q. Go through that book and see whether there
is any other loss made in a similar way by sales of
stock? A. No, sir; I have been through them, and
I don't remember any others.

1833

By the Special Commissioner:

Q. That is between those dates? A. That is be-
tween those dates.

Q. Those are the only two sales of stocks? A.
I think so.

Q. The majority of the business was the—what
is the result of the exchange—the exchange that
was sold there?

Same objection. Same ruling. Exception.

A. It is impossible to determine what is the exact
profit or loss on the exchange until a statement is

1834 received from the foreign bankers, inasmuch as the accounts have to be paid in pounds, say, in England, and it would depend upon the rate of exchange at the time of settlement.

By Mr. Larkin:

Q. Now, as a matter of fact, Mr. Cook, isn't the amount, if it is a profit, a small one, or, if the amount is a loss, isn't the loss a small one?

Mr. Elkus: I object to that as mere guesswork.

The Special Commissioner: It is less than one per cent?

1835 Mr. Elkus: I object to it as incompetent, immaterial and irrelevant and mere guesswork.

Objection overruled. Exception.

The Witness: There were a great many transfers on which there was no profit or loss, where money would be transferred from one bank to the credit of another bank, sometimes by cable and sometimes by letters.

By the Special Commissioner:

Q. That is, they are transferred on the otherside?

1836 A. Yes, sir. You see, there is no profit or loss on that, but the transactions as appearing on the Journal seem quite large, especially the last few days of October, when there was a great deal of that done.

Mr. Elkus: I move to strike that all out as incompetent, immaterial and irrelevant and on the same grounds on which I have objected before.

Objection overruled. Exception.

By Mr. Larkin:

Q. The bulk of the business carried on between the 25th and 30th was the exchange business, wasn't it?

Same objection. Same ruling. Exception.

A. Yes.

1837

Q. As shown by these books which are before you? A. Yes.

Q. Leave out of consideration, if you please, the exchange business. I want you to take up the entries of other business done and state to the Referee whether, from the transactions so indicated on the books, there was a profit or a loss in any substantial amount?

Same objection. Same ruling. Exception.

A. Do you want me to go item by item? The first item of brokerage——

Mr. Elkus: I object specifically upon the ground they are putting in entries from the books which are not in evidence. 1838

The Special Commissioner: The books have all to be properly proven or else you can move to strike it out.

Mr. Elkus: Exception.

The Witness: The first item is Credit Journal page 40, under date of October 25.

Mr. Elkus: I specifically object that this is not the proper way of proving any transactions of Kessler & Company. It is not the best evidence, even if the books are proved to be correct accounts of the transactions.

1839

By Mr. Elkus:

Q. Have you a statement of the affairs of the firm? A. Yes; we prepared that statement, although we did not put in the prices. We have got the statement, but it depends altogether upon the appraisal of the securities and assets.

The Special Commissioner: Repeat the question.

(Question repeated as follows: "Leave out of consideration, if you please, the exchange business. I want you to take up the entries of other business done and state to the Referee whether, from the

1840 transactions so indicated on the books, there was a profit or a loss in any substantial amount?")

Same objection. Same ruling. Exception.

The Witness: There is no substantial amount, either profit or loss.

Q. Taking into consideration the exchange business which you omitted in answer to my last question, can you state whether or not there was a profit or loss as the result of the exchange business done during that period?

1841 Mr. Elkus: That is objected to as incompetent, immaterial and irrelevant and calling for the witness's conclusion.

The Special Commissioner: If it is a conclusion based on the figures, entries made in the books, you can give it. If it is only a guess, why you cannot.

The Witness: I cannot so state from the entries so shown in the books.

Q. By themselves? A. By themselves.

Q. But you can take the entries in the books, together with the accounts from the correspondence, and state whether or not there was a profit or a loss?

1842 Same objection. Same ruling. Exception.

A. What is the question?

Q. Whether you can tell substantially whether there was a substantial profit or a substantial loss during that period of five days. Can you tell by a hundred thousand dollars whether there was a loss during the five days between October 25th and October 30th, 1907? A. Yes.

Q. Can you state within \$50,000 whether there was a loss? A. Yes, sir; from the bankers' statements that are now coming in, it would appear that the loss—

Mr. Elkus: I object to them referring to any 1843
bankers' statements. They are not books in evidence.

Objection sustained.

Q. Leaving out your bankers' statements, can you state within \$25,000 whether the transactions would result in a profit or a loss?

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant; not the proper way of proving solvency or insolvency, and not the proper way of proving entries in books or transactions of Kessler & Company.

Objection overruled. Exception.

1844

The Witness: It is the only way you can determine what the profit or loss is.

By the Special Commissioner:

Q. Judging each transaction by the result? A.
Yes, sir; by referring to the bankers' statements.

Q. That is, showing the result? A. Yes, sir.

Q. That is, on the books alone you can tell? A.
Yes.

By Mr. Larkin:

Q. Were these bankers' statements adopted by 1845
Kessler & Company and entered in their books?
A. Yes.

Mr. Elkus: The bankers' statements that have come in since the bankruptcy? I object to it as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

Q. As a matter of fact, Mr. Cook, in this exchange business they charge you a commission?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant. This witness cannot tell

1846 about the transactions of Kessler & Company. He was not in their employ.

Objection sustained.

Q. Leaving out of consideration the question of commissions in regard to this exchange, is it or isn't it a fact that the only question is the question of the rate of exchange as to the result of a profit or a loss?

Mr. Elkus: I object to it as incompetent. This witness is not competent to testify as to the transactions of Kessler & Company.

Objection sustained.

1847 Q. Can you state, as a result of your examination of the books that are before you, from the 25th of October to the 30th day of October, whether or not the exchange business carried on in that time resulted in a profit or loss, and, if so, what the amount is?

Mr. Elkus: Objected to as calling for the conclusion of the witness.

The Special Commissioner: Strike out the last part and ask the two questions separately. I will allow you to ask the first question and let him answer yes or no.

1848 Q. Can you state, as a result of your examination of the books that are before you, from the 25th of October to the 30th day of October, whether or not the exchange business carried on in that time resulted in a profit or a loss?

Same objection. Same ruling. Exception.

By the Special Commissioner:

Q. Whether you can tell from the books before you if the exchange business resulted in a profit or a loss? A. No.

By Mr. Larkin:

1849

Q. Can you state whether or not, if it resulted in a profit, whether that profit was substantial or not?

Mr. Elkus: I object to that. He states he cannot tell whether it was a profit or a loss. I object to it as incompetent, immaterial and irrelevant; on the ground it is mere guess work, and he is stating conclusions from books not in evidence and entries not in evidence.

No ruling.

The Witness: No.

Q. Why can't you tell from the books?

1850

Mr. Elkus: I object to that because that calls for a conclusion on the part of the witness.

Objection overruled. Exception.

The Witness: Because when bills are sold in Sterling, the money is received in American dollars and the account is credited in American money, but when the time comes to settle with the foreign bankers, the payment is to be made in pounds, and it would be a question as to the rate then prevailing for Sterling in order to purchase it to send over there to meet the obligations. There might be a difference in the rate at which the draft was sold and the rate at which the exchange had to be purchased. 1851

Q. And that is what you meant by stating before that you could not tell whether the transaction resulted in a profit or a loss?

Same objection. Same ruling. Exception.

A. It was.

Q. Are you able to state to the Referee whether or not that difference in exchange would result in a substantial loss or a substantial profit or whether it is unimportant?

1852 Mr. Elkus: I object to that as calling for the conclusion of the witness.

Objection sustained.

Q. Can you state in dollars and cents, Mr. Cook, practically the result of the exchange business during those five days?

Mr. Elkus: I object to that on the same ground as before.

Objection overruled. Exception.

A. You mean the total amount sold—purchased?

1853 Q. During the five days between October 25th and October 30th, 1907, the result of that business in dollars and cents—whether it amounted to a loss, and, if so, how much, or whether it resulted in a profit, and, if so, how much?

Same objection as before. Objection overruled. Exception.

A. Not in dollars and cents; no, sir.

Q. Can you in pounds, shillings and pence? A. No, sir.

Q. Can you state a figure as to which it would not exceed—either a profit or loss?

Mr. Elkus: I object on the same grounds as before.
1854 fore.

Objection overruled. Exception.

A. It would be merely an opinion, Mr. Larkin, based upon the rate at which the bills were sold and the closing rate on the 30th of October.

Q. Do you know what those rates were? A. No, sir. I know that I could determine very shortly now by reference to the newspapers.

By Mr. Elkus:

Q. Did you prepare statements of the assets and liabilities of the firm of Kessler & Company taken

from their books and the entries in the books as of 1855 the 30th day of October, 1907?

Mr. Larkin: I object to that on the ground I have not finished the examination of this witness, and it is not proper cross-examination.

The Special Commissioner: You suspended your examination. I will allow the question.

The Witness: Yes, as shown by the books.

By Mr. Larkin:

Q. Are you able to state, Mr. Cook, the amount of exchange that was sold during those five days?

A. Not without reference to the books downstairs. 1856

Q. Will you refer to those books downstairs and bring them up here so that you can answer that question? A. Yes, sir. You couldn't do it except by taking them out. You would have to figure them out and add up four or five pages, you know.

Q. Of exchange sold during the five days? A. I think so; yes, sir.

Q. Is it as much as that? A. Yes, sir.

NORTH MCLEAN, a witness called on behalf of the Receiver, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. LARKIN:

1857

Q. Mr. McLean, you were formerly in the employ of Kessler & Company of New York? A. Yes.

Q. And how long were you in their employ? A. About 21 years.

Q. And you continued in their employ down to the time of the assignment? A. Yes.

Q. You then remained with the Assignee? A. Yes.

Q. And are now with the receiver and trustee? A. Yes.

Q. What branch of the business did you have

1858 charge of? A. For the last few years I had charge of the foreign exchange.

Q. The last few years? A. Yes.

Q. Now, won't you please state to the Referee what the commissions of the house were on foreign exchange business, if you can? Were they paid a commission? A. I don't know what you mean. What margin there was in transactions? Now, paid us commission? No.

By the Special Commissioner:

Q. What was the profit? How did you make your profit on foreign exchange? A. By buying
1859 commercial bills or bankers' long-sight bills, discounting them and selling our own checks, on which there would ordinarily be a margin.

Q. How much? A. One thirty-second of one per cent. is good margin, if you don't take chances with the kind of bill you buy.

Q. If you get good bills every time? A. Yes.

Q. That would be good, average profit, wouldn't it—thirty-second of one per cent.? A. Leaving out either speculating or buying a bill on which you take a chance.

By Mr. Larkin:

1860 Q. Now, I specifically call your attention to the exchange business during the period of October 25 to October 30th, 1907, inclusive, and ask you whether or not that percentage which you just mentioned would be a fair statement as to the profit which would be made during that period of five days on the business done?

The Special Commissioner: Examine the books as to the business done, to refresh your recollection.

(The witness does so.)

The Witness: That is pretty difficult. I couldn't 1861
do that. The journals don't state prices. I don't
know just how I could do it.

By the Special Commissioner:

Q. Doesn't the journal state what you paid for
the bills? A. No.

Q. Neither of the journals? A. No.

By Mr. Larkin:

Q. Is there any reason for you to believe that
you made less in that period than theretofore?

Mr. Elkus: I object to that as calling for his
guess—supposition. 1862

Q. Did you make less in the period of five days
than one thirty-second of one per cent. for the ex-
change sold at that time?

Mr. Elkus: If the witness knows.

The Special Commissioner: If you know.

The Witness: I don't know.

Q. Did you make more than that? A. I don't
know. If you want me to explain——

Q. We are just trying to see whether or not
your statement of one thirty-second, which you
stated a moment ago was a fair profit in this
period—I want to know whether one thirty-second
of one per cent. is a fair statement of a profit, if 1863
you made any profit, during that period of five
days? A. When I stated that the thirty-second was
a fair profit, I meant an average profit. Sometimes
you would make twice as much and sometimes you
would make nothing; and you cannot in that busi-
ness make a fixed profit or what would be a fixed
profit on any transaction. Very often you make
nothing; other times you make twice or three times
as much.

Q. Where you bought no merchants' bills or
simply sold your own exchange in the street, what

1864 profit did you make on that? A. I couldn't tell you. Often, if you got the market right, you would make a bigger profit on the bankers' than on the merchants' bills.

Q. I am speaking of the period between October 25th and October 30th, and I want you to look at the books and see whether you find any entries which lead you to believe that this exchange during this period was sold against bankers' bills previously purchased?

Mr. Elkus: I object to that as calling for the entries in the book.

1865 The Special Commissioner: That is taken subject to the books being properly proved.

Mr. Elkus: And also on the same grounds as to all transactions between October 25th and 30th —on the ground that is not the proper way to prove insolvency on October 25th.

Objection overruled. Exception.

The Special Commissioner: You can look at the books and see.

(The witness does so.)

The Witness: Bankers' bills previously purchased?

1866 Q. Or at that time purchased? A. There is an item of 25,000£, bankers' bills purchased (indicating) against which exchange was sold.

Q. Yes; go ahead and see whether there are any others? A. There is an item (indicating) of 500,000 Francs. There is an item (indicating) of 10,000£ under date of October 29, Louis Dreyfus & Company. I haven't got the full particulars of these things. There are no rates in there, except the people to whom remittances were made.

Q. Wouldn't the dollars and cents show the rate?

Same objection. Same ruling. Exception.

A. Not without elaborate figuring. There is an 1867 odd amount of dollars and an odd amount of cents.

By the Special Commissioner:

Q. Does seeing those entries there recall to you the transactions? A. No.

Q. You actually did the business, didn't you? A. Yes.

Q. And those entries were made under your supervision in the books? A. No.

Q. Whose handwriting are they in? A. One of the bookkeepers.

Q. What was the course of business when you bought exchange? How did it go into the books? 1868

A. The course of business was that I made the purchase and passed the contract—memorandum of contract—to the clerk who attended to the entries, and that clerk made a slip, which went to the bookkeeper—to the cashier and then to the bookkeeper.

By Mr. Larkin:

Q. Well, now, you have pointed out all the entries that you find where exchange was sold against bankers' bills, haven't you? A. I think so. I have pointed out all the bills that I noticed where I purchased bankers' bills. 1869

Q. Now, the result of those transactions would be a profit of about one thirty-second of one percent, would it? A. Ordinarily, I haven't any recollection of what it was in this case.

Q. That applies to this period between October 25 and October 30th that you have just referred to in your books?

Same objection. Same ruling. Exception.

A. I don't know what you mean—"It applies to." I have got a recollection as to what the profits were on the transactions I have stated.

1870 Q. Your profit you stated would be one thirty-second of one per cent.? A. I said it might be one thirty-second or it might be two or three times one thirty-second; a thirty-second was a good average.

Q. Are you able to state what your average profit was for the period between October 25 and October 30th, 1907? A. No.

Q. Was it one thirty-second of one percent? A. I couldn't state.

Q. Did it result in a loss? A. No.

Q. Don't you know that it did result in a loss? A. I do not.

Q. What makes you say that?

1871 Mr. Elkus: I object to that as incompetent and improper.

The Witness: You asked me don't I know it, and I said no.

Q. If it did not result in a profit or a loss, how did it come out—even? A. I said I didn't know.

Q. Does anybody know? A. I could look it up.

Q. What would you have to do to look it up? A. I should have to look up the rates of exchange that we bought and sold at and the rates of discount when the bills arrived. If you buy bills and ship them to the other side—the market changes. There may be a loss or a profit. If your judgment is good, you make a profit; if it isn't, you make a loss.

1872 Q. It is pretty close, then, is it? It is close work, then, isn't it? A. It is difficult, careful work.

Q. To make a profit on exchange? A. Yes.

Q. You say that you could tell the Referee definitely what the profit was by looking it up, could you? A. On any particular transaction which you name, yes.

Q. I should like very much if you can give us the transactions between October 25 and 30th where the exchange was sold— A. Where the exchange was sold?

Q. Where you sold exchange? A. You mean 1873 where I bought?

Q. Any case where you sold exchange against bankers' bills or where you simply sold your own bills. Could you do that? A. I can look up the items that I have mentioned there.

Q. You have mentioned two or three items—one of Louis Dreyfus and the other of the Union Discount Company. Now, aside from those, can you tell what the profits would be in the event of sale of exchange not against bankers' bills? A. No.

Q. You could not? A. No.

Q. I want you to please state to the Referee why it is that you can tell whether or not a profit 1874 is realized by the sale of bankers' bills and you cannot tell whether a profit is realized by the sale of your own bills? A. A profit involves a purchase and a sale.

Q. And when you would issue your own bill, it does not carry with it the element of profit? A. That is one side of it.

Q. What is the other side of it? A. The purchase, prior or subsequent.

Q. In a case where you do not buy merchants' bills, I am asking you now? A. Well, the principle is the same, whether you buy merchants' or banker's bills.

Q. Where you sell your own bills—where do you look for the profit in the sale of your own bills? A. I figure that the market is going to move in such a manner as to enable me to purchase at a price that would leave a profit. 1875

Q. In other words your profit is in the difference of exchange—is that right? A. Partly.

Q. And what is the other part of it? A. A profit might arise from an interest rate.

Q. Now, is there any other element where profit might arise except from the interest rate and the

1876 difference in exchange? A. The discount rates—the difference in them.

Q. That would be included in the interest rates?

A. By interest rate, I mean rate here. By discount rate, rate in Paris or Berlin, Hamburg or London.

Q. In a case where you sold your own bills during the same period, from October 25th down to October 30th, can you tell the Referee whether the sale of the bills of Kessler & Company of New York resulted in a profit or not? A. In the cases that I have mentioned?

1877 Q. No; in any case during this period from October 25th to October 30th? A. In a case where there was both a purchase and a sale, yes.

Q. Won't you please define what you mean by a purchase and a sale of the bills of Kessler & Company of New York? A. If you want to make a profit in exchange or wheat or stocks or any commodity, you have got to both buy and sell. You aim to buy at a lower price than you sell at. If you merely sell, you have made one end of your transaction. You may sell in the hope of buying later. You may sell because you have previously bought. If your selling price is higher than your purchase price, you make a profit.

1878 Q. Suppose Kessler & Company sold their own bills on Manchester, say for £10,000. Kessler & Company of New York would then realize the equivalent of £10,000 in New York at the then rate of exchange, wouldn't they? A. Yes.

Q. Now, they would then have to meet that draft when its due date arrived and pay the face of the draft, plus interest, wouldn't they? A. No; they would have to pay the face of the draft.

Q. They would have to pay the face of the draft? A. Yes.

Q. Then the question would be whether there was a profit realized, which would depend entirely

upon the rate of exchange and the discount rates 1879 on the other side as well, wouldn't it? A. Not entirely. It would also depend upon what money was worth for the time here.

Q. So that, if Kessler & Company were paying high rates of money here—eight or ten percent, we will say—and the discount rate in London would be only four or five or six percent, they would make the difference in interest—is that it? A. Yes.

Q. Aside from this question of interest, there was no profit in that sort of a transaction, where they sold their own bills on Manchester? A. No.

Q. Now, can you state, taking the different drafts which were sold, in a similar way, whether 1880 or not any profit was realized. I am simply referring to the period between October 25th and October 30th? A. The bills which were sold on Kessler & Company of Manchester were usually 60 or 90 days' sight, and, to determine whether there would be a profit in that transaction, a period of time of at least 60 or 90 days would have to elapse.

Q. From what? A. Between the time the draft was sold and the time the draft was covered, in order to determine whether there would be a profit.

Q. Does the discount rate on the other side vary from time to time? A. It does.

Q. When the drafts are discounted, the discount 1881 rate is fixed, isn't it? A. Yes.

Q. Why do you have to wait for 60 days after that? A. Because you don't know what you are going to get for the money that you have for 60 days, and you don't know what rate of exchange you have to pay until 60 days later for your cover.

Q. You don't know what you have to pay for money to meet your cover, do you? A. I don't know that you have to borrow money to meet your cover.

A. Assuming that Kessler & Company had to go so far at any time in their career as to borrow

1882 money—assuming that Kessler & Company borrowed money—the amount of interest which they pay would also be an element, wouldn't it, which would work against the profit in the matter? A. When you draw long bills of exchange, you obtain money. That is a method of borrowing money.

Q. A method of borrowing money for 60 and 90 days? A. Yes.

Q. And for that you have to pay the discount rate on the other side, as well as the rate of exchange? A. You have to pay the rate of discount on the other side, and you have to cover the bill at whatever the market is at the time the bill
1883 matures. That may be higher or that may be lower than it was at the time you drew the bill.

Q. Now, Mr. McLean, can you state just briefly whether or not the business conducted between the 25th and 30th—exchange business, of whatever name and nature it was—resulted in a profit or not?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant, and for the same reasons as before, as not the proper way of proving solvency or insolvency.

The Special Commissioner: He can answer that yes or no. Whether you can state.

1884 The Witness: I cannot at this moment.

By the Special Commissioner:

Q. Can you work it out from the books? A. I have already stated that I did not know it, but I could determine it in reference to those transactions.

Q. The transactions referred to—you mean where exchange had been sold against bankers' bills—is that right? A. I mean on all the transactions where there was both a purchase and a sale, of which these are samples. If there is not both a purchase and a sale, there cannot be a profit.

Q. Will you please put your finger on any entry 1885 between October 25th and October 30th where there was not a purchase and a sale, so that we can understand concretely what you mean by that?
A. I cannot put my finger on a particular transaction of that kind, no.

Q. Would a transaction of that kind be one where the New York house sold a draft on Manchester? A. I don't think there were any Manchester drafts sold on the dates you mention.

Q. 25th and 30th of October? A. 25th and 30th of October, no.

Q. Can you state to the Referee a figure which would cover the amount of profits made as a result of the exchange business during that period? Make it a liberal figure? A. I cannot.

Q. Could you make it within a hundred thousand dollars? A. Yes.

Q. Could you make it within \$25,000?

Mr. Elkus: I object to that as guesswork.

Objection sustained.

Q. How long will it take you to work it out, Mr. McLean?

By Mr. Elkus:

Q. How long—a half hour or two or three 1887 hours? A. Two or three hours, yes, if I could put my hand on the data.

By the Special Commissioner:

Q. You can do that, then, between now and Saturday? A. Yes.

Q. You will have two days? A. Yes.

By Mr. Larkin:

Q. Does what you are going to do take into consideration everything in the books between the

1888 dates I have mentioned where exchange was sold?

A. Where exchange was purchased?

Q. Yes. A. Yes.

Q. When you state "purchased," you mean by whom? A. By Kessler & Company.

Q. Kessler & Company didn't purchase exchange, did they? A. Every day of their business.

Q. They sold it, didn't they? A. They purchased it all the time.

Q. How about when they sold exchange? A. Well, they sold, too. They dealt in exchange. A dealer buys and sells. We all know that.

1889 NORTH McLEAN.

DIRECT-EXAMINATION RESUMED:

By Mr. Larkin:

Q. Mr. McLean, since the last session, have you examined into the exchange business which you handled for Kessler & Company, for the period from the 25th day of October, to the 30th day of October? A. I have.

Q. And are you able to state, as a result of that examination, whether there was a profit or a loss? You can state? A. Yes.

Q. Will you please state what that loss was?

1890 Mr. Elkus: I object on the ground it is incompetent, immaterial and irrelevant; not the proper way of proving solvency or insolvency, and no proper foundation has been laid for this question.

Q. Will you state to the Referee what you have done for the purpose—what you have done in regard to examining these transactions regarding exchange?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant, and as calling for the acts of the witness, and not for his testimony.

Objection overruled. Exception.

By the Special Commissioner:

1891

Q. What investigation of the books, the transactions happening since the 25th, from the 25th to the 30th of October, have you made? A. I went over the journals and examined the sales and purchases. I looked at the discount rates in London and the closing rates of exchange on the 30th of October—different classes of exchange—and made my calculations from those data.

Q. You covered all those exchange transactions of the firm, did you? A. All those of any material size.

Mr. Elkus: Now, it appears as from the witness' testimony that his calculations have been based upon some figures. I don't know where he got them from—but closing figures in London he describes them. 1892

Q. What do you mean by "closing figures in London"? A. The closing rates in exchange in New York on October 30th—the discount in London was the London quotation that I looked up.

By Mr. Elkus:

Q. You got those from some newspaper? A. I did.

1893

By Mr. Larkin:

Q. You got them from the newspapers, and, as you recollect, they corresponded with the rates as you got them during that period?

Mr. Elkus: I object to that. We are not going to be bound by newspaper records.

The Special Commissioner: The question now is whether the newspaper records corresponded with the facts. That is the question, isn't it? The question is whether they corresponded with the news-

1894 paper; the question is whether the rates were the rates of those transactions.

Mr. Larkin: That is the question.

The Witness: The actual rates of the transactions are all entered in our books.

By the Special Commissioner:

Q. Then you got the rates from the books? A. And the rate of discount—I obtained the London rate of discount—I examined the correspondence from London, from the London correspondent to whom—the London banker to whom the bills were sent. Some of the transactions were not completed;
1895 that is, a sale was made, with the exception of a purchase—and to complete those transactions I looked up the closing rates of exchange on October 30th, the end of the period about which you are inquiring.

By Mr. Elkus:

Q. Then, if I understand it, you estimated a profit or a loss according to those rates, although the transaction never actually took place.

By the Special Commissioner:

Q. What did you mean to say? A. I meant to
1896 say that a certain transaction was—it was half completed in the sale of a bill of exchange.

Q. Then the assignment, you mean, interrupted—left it partly completed? A. Yes.

Q. What calculation did you make in regard to a transaction of that kind? A. Why I calculated what profit or loss there would have been in the transaction if a purchase of a banker's bill had been made at the close of the market on October 30th, to cover the prior sale of Kessler & Company's bill.

Q. Now, you didn't do that, did you? A. Yes.

Q. You made the calculation, but Kessler & Company didn't make the transaction? A. No.

Q. The transaction was interrupted? A. Yes. 1897

Q. Now, the question is, how did that leave that transaction as it affects Kessler & Company? A. I don't know that it affected them, as far as the profit and loss of the transaction was concerned, either way.

Q. Then you can count out all those transactions? A. I got all the data I got so as to be posted for what you wanted.

By Mr. Elkus:

Q. I want to ask this: You figured the loss or profit according to the exchange rates on October 30th. In the ordinary course of business, you would 1898 not have had a purchase on October 30th, would you, on these drafts—to meet those drafts? A. I could not say.

Q. They were all sixty or ninety day drafts, after sight? A. No, demand drafts.

Q. You mean the ones you purchased are demand drafts? A. The one I sold is a demand draft. I might purchase sixty or ninety day drafts. The ones I sold were demand drafts.

Q. When were they sold? A. Between October 25th and October 30th.

Q. Then they ran about eleven days, didn't they?

A. From seven to nine days before presentation. 1899

Q. That would make none of them due before October 30th? A. Correct.

By the Special Commissioner:

Q. Then do I understand that all those transactions of that kind which were—that they had no effect whatever upon the situation of Kessler & Company?

Mr. Larkin: He sold the drafts and got the money for them.

Q. Then you had a liability?

1900 Mr. Larkin: Had a liability, and that liability exists now.

Q. When these transactions that you have spoken of—was that the same kind of a transaction, the selling of drafts, or was there also the buying of drafts? A. In some of them there was both buying and selling.

Mr. Elkus: I wish to take an objection to this.

The Special Commissioner: Yes.

Mr. Elkus: Exception.

Q. Take up the selling of drafts. What was the result? A. In cases where there was both a purchase and a sale?

Q. Yes. A. Well, the chief item of that character and about which I was questioned at the last hearing was the purchase of £25,000 of bankers' sixty day bills, and the sale to the same banker of £25,000 of Kessler & Company demand bills.

Q. What was the result of that transaction? A. The result of that transaction? The bill was sent forward and was discounted on arrival in London after the assignment, and there was a loss of about \$412 on it.

Same objection. Same ruling. Exception.

1902 By Mr. Elkus:

Q. That was after the assignment? A. Yes.

Mr. Elkus: I move to strike that out on the ground it is incompetent, immaterial and irrelevant.

The Special Commissioner: I think I will let that stand.

Mr. Elkus: Exception.

By Mr. Larkin:

Q. Will you go on, Mr. McLean, and state, if you can, what the results of the purchases and sales of

exchange were during this period, and whether they 1903
resulted in a profit or a loss?

Mr. Elkus: I object upon the same grounds as before. The witness is giving his conclusion, not testifying.

The Special Commissioner: I will allow him to do that.

Mr. Elkus: Exception.

The Witness: Do you refer to transactions in which there was both a purchase and a sale, or to transactions which I calculated as if they had been closed?

Q. I want all the transactions between the 25th 1904
and 30th—those where there was a purchase and a sale, and those where there was a sale of exchange, with a purchase, to the Company.

Mr. Elkus: I object to that question on the same grounds as before, and specifically upon the ground that it calls for transactions—calls for a result——

Mr. Larkin: I will withdraw that question.

Q. In other words, a consummated transaction.

Mr. Elkus: I object on the same grounds as before.

Same ruling. Exception.

1905

Q. Take a transaction which is completed, where there was a sale of exchange, and a subsequent purchase? A. Do you want me to specify them or just state——

The Special Commissioner: Leave that for cross-examination. I think that you, as a competent man to examine the books, can give your results on them—can go into the transactions if they want to.

The Witness: There was a loss of about \$101 on the completed transactions, beyond the one that I have explained, talked of—the £25,000.

- 1906 Q. Will you please state to the Referee the amount of money which was involved which resulted in that loss? I want to show how infinitesimal compared with the amount involved, the amount of profit is in the exchange business.

Same objection. Same ruling. Exception.

A. The amount involved in the transactions in which I have stated there was a loss of about \$100 was about \$42,000 purchases, and \$42,000 sales.

Q. Are you able to state what the amount of the exchange business was during the five days from the 25th to the 30th?

- 1907 Mr. Elkus: That is objected to as irrelevant and immaterial.

By the Special Commissioner:

Q. Are you prepared to state that you can answer that?

Mr. Elkus: Exception.

The Witness: Well, I have a list here of all the sales.

Q. What does that aggregate?

Same objection. Same ruling. Exception.

The Witness: About \$225,000.

1908

By Mr. Larkin:

Q. The normal amount of profit, I think you said in your last examination, was about $1/32$ of one per cent., if a profit were made? A. That is a very satisfactory average profit.

Q. And the average loss—does it run to a higher point than $1/32$ of one per cent. if there is a loss?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant, and speculative.

The Special Commissioner: Objection sustained.

Mr. Larkin: Exception.

Q. You have got all these transactions in the 1909 exchange during this period, except those where the exchange were sold, but was not subsequently covered by a purchase of other bills? A. I have. In the total I have given you, I have given you the total of all the sales of exchange in that period.

By the Special Commissioner:

Q. And do you distinguish, in addition to all the sales, where—— A. In some cases, there were purchases, and some there were not. That is the rough amount of the sales.

Same objection. Same ruling. Exception. 1910

Q. Of the purchases? A. Gross sales.

Q. How about the purchases? A. I can give you that. The purchases, about \$125,000.

Q. And the result—a profit or loss?

Same objection. Same ruling. Exception.

A. The result is a loss of a trifle over \$500.

Q. You have stated now the amount of the business, of the exchange business, and the amount of the profit and loss of all the transactions during those days, have you? A. Yes—that were completed, both ways.

By Mr. Larkin:

1911

Q. Now, Mr. McLean—— A. Excuse me. There are a number of transactions of drafts of ten, twenty or fifty——

By the Special Commissioner:

Q. But that would not aggregate—— A. The difference would not make three or four dollars.

By Mr. Larkin:

Q. Mr. McLean, you had charge of the exchange business? A. Yes.

1912 Q. The credit and debit journals were kept by whom? A. Two bookkeepers.

Q. And who was the chief bookkeeper? A. A man named Brettschneider.

Q. When you made a transaction in exchange, what did you do in the ordinary course of business?

The Special Commissioner: You mean as to having a record made of it?

Mr. Larkin: Yes. I want to get the books in evidence, if I can.

1913 The Witness: I immediately made a memorandum contract with a buyer or a seller, passing that contract through after initialing it, to the clerk who had charge of, respectively, bills bought or bills sold, and who made the necessary entries, drew the bills, and made a slip, debt or credit slip, out for the dollar equivalent of the bills. That slip went to the cashier and was checked by him with the amount of money paid in or taken out, respectively, and from the cashier the slip went to the bookkeeper who took charge of these journals.

By the Special Commissioner:

Q. And entered it? A. In those books.

Q. It was his duty to enter them in the journal?

1914 A. Yes.

By Mr. Larkin:

Q. Was it any part of your business to see that the entries from the slips were correctly made in these journals? A. Not directly; only as from each day's transaction a trial balance was made out, and I had general supervision of the trial balance, and knew about where I stood on different accounts, and if there was any mistake of large size, I would be apt to find it; a mistake of a small amount I would not be apt to find out.

Q. Then, trial balances were made out from

these journals, and were presented to your every 1915 day? A. Yes.

Q. After three o'clock? A. The first thing in the morning—the previous day's business.

Q. In that manner, you kept check upon the debit and credit journals? A. Yes.

By the Special Commissioner:

Q. Who were the other bookkeepers? A. A man named Brooks, and a man of the name of Hertel kept the other journal. Brettschneider did not enter those books.

By Mr. Larkin:

1916

Q. He was the boss of that department, wasn't he? A. Yes.

Q. You had a transaction on or about the 25th of October with a Mr. George Weiss, where a draft was sold to the order of the Anglo-Foreign Banking Company. Do you remember that transaction? A. I do.

Q. Mr. Weiss—— A. I don't remember it was made on the 25th of October. I remember the transaction.

Q. On or about that date? A. Yes.

Q. Mr. Weiss was a merchant in this city?

Mr. Elkus: I object to that as incompetent, im-¹⁹¹⁷material and irrelevant. The witness is not competent to prove the transaction, or prove any facts with reference to Weiss' citizenship or residence.

Objection overruled. Exception.

A. He was.

Q. And the draft was delivered here, and the money was paid?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

1918 A. Yes.

Q. The exchange was sold to him here and the money was paid here?

Same objection. Same ruling. Exception.

A. Yes, and no.

By the Special Commissioner:

Q. Explain what you mean? A. I will explain, if you wish.

1919 Q. You had better? A. We received documents for dried fruits from a London banker, with instructions to turn them over to George Weiss against his trust receipt which covered his engagement to pay the proceeds of those goods as they were sold to Kessler & Company for the shippers of the merchandise, and the money that he paid in, and for which he purchased a sixty days' sight draft—I think it was—was part of that trust fund which was derived from the sale of this merchandise, and which we were to remit to the shipper or the shipper's agent in London.

Mr. Elkus: I move to strike that out.

By the Special Commissioner:

Q. The shippers—were they British merchants?

1920 A. The shippers' agent. The people that we knew in the matter—it was a London banker—Anglo-Foreign Banking Company. We got the documents from them.

By Mr. Elkus:

Q. Acting as their agents? A. Yes.

Mr. Elkus: I move to strike out the answers of the witness on the ground—in them he gives the contents of instruments in writing, and purports to give their legal effect and to state what they purport to be, and that is incompetent, immaterial and irrelevant.

By the Special Commissioner:

1921

Q. How did they pay them? A. By New York check.

Q. So the funds went into your hands? A. They did.

Q. And it was your duty to remit them to your correspondents, wasn't it? A. In accordance with his instructions.

Q. That is, with the London banker? A. Yes, sir.

The Special Commissioner: I will deny your motion.

Mr. Elkus: Exception.

1922

By Mr. Larkin:

Q. Is it a fact that the following draft, No. 203,-417, dated October 25, for £136 7s and 10d, amounting to \$654.58, purchased by Weiss, as you have stated, was drawn upon Kessler & Company, Limited, of Manchester.

Mr. Elkus: I object to that as not a correct statement of the facts, assuming facts not proven, incompetent and calling for the conclusion of the witness.

By the Special Commissioner:

1923

Q. Was Weiss a party to the bill? A. He bought it; he paid for it.

Q. Did he put his name on it in the ordinary course of business? A. No, sir.

Q. Nor in negotiating it? A. No.

Q. He bought it and paid for it and owned it? A. Yes.

By Mr. Elkus:

Q. He sent you this check, he paid the money which was owing—his check on the New York Bank—in accordance with the banker's instruc-

- 1924 tions in London, you remitted in the way you stated by purchasing a draft on London? A. In this particular case, he instructed—he paid us a certain sum of money and instructed that the equivalent be remitted by a draft of that character.

By Mr. Larkin:

Q. Will you look at the list, the schedule I show you, and state whether or not the drafts mentioned in that list were drawn upon Kessler & Company of Manchester by Kessler & Company of New York?

- Mr. Elkus: I object to that as incompetent, immaterial and irrelevant.
- 1925

Objection overruled. Exception.

A. That appears to be right.

Q. And the amount and dates are correctly set forth, are they? A. I haven't a recollection of the exact dates of the different transactions running back into July.

Q. But you do recollect the transactions from the date—— A. In a general way.

Q. And they were all drawn on Kesler & Company, of Manchester? A. Yes.

Mr. Larkin: Now, I will offer this list in evidence.

- 1926 Mr. Elkus: I object to it as irrelevant and immaterial. I object to it because it has nothing to do with this case.

Objection overruled. Exception.

The Special Commissioner: That purports to be a list of drafts that were drawn by Kessler & Company on Kessler & Company, Limited—is that it?

Mr. Larkin: Yes.

Received in evidence and marked Receiver's Exhibit 73.

Q. These transactions took place here in New York City, didn't they, that are shown on this list?

Mr. Elkus: I object to it as incompetent, immaterial and irrelevant, and calling for the conclusion of the witness, and it is a question of law whether they took place in New York City. 1927

Q. Was the exchange sold and paid for in this City?

Mr. Elkus: I object to that, and——

Mr. Larkin: I will withdraw the question.

Q. Will you please state whether or not the transaction with the Colonial Bank took place, in so far as relates to the purchase and sale of exchange in this city.

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant. 1928

Objection overruled. Exception.

Mr. Elkus: Not a question of fact, and upon the same grounds as heretofore.

The Special Commissioner: I will allow it.

Mr. Elkus: Exception.

The Witness: Yes.

Q. Dated October 16th, 1907. The transaction with W. L. S. Jackson & Company and the Union Discount Company, on September 24th, 1907—was that exchange sold and paid for in this city?

Same objection. Same ruling. Exception. 1929

By the Special Commissioner:

Q. What is the amount? A. That amounts to £20,000.

By Mr. Larkin:

Q. Numbers 202,965 to 202,968 are the numbers of the drafts? A. The transaction was made in New York.

Q. And the transactions with Uhlfelder, Thompson & Company, and the Anglo-Foreign Banking Company, drafts numbers 202,836 to 202,841, in-

1930 exclusive, September 16th, 1907—did that transaction take place, so far as relates to the purchase of exchange and payment therefor, in this city?

Same objection. Same ruling. Exception.

A. It did.

Q. And the transaction with John Munroe & Company, September 13th, 1907, drafts numbers 202,828 to 202,829—did that take place so far as relates to the purchase and payment of exchange in this city? A. It did.

By the Special Commissioner:

1931 Q. Are there any there that did not occur in New York City?

Same objection. Same ruling. Exception.

By Mr. Larkin:

Q. There was no transaction which did not occur in this city, so far as relates to payment? A. There are none.

Mr. Elkus: That is taken subject to my objection?

The Special Commissioner: Yes.

Mr. Elkus: Exception.

1932 CROSS-EXAMINATION BY MR. ELKUS:

Q. Do you know whether or not those drafts which have been on the list have been accepted by Kessler & Company, Limited? A. Personal knowledge? No.

Q. They have been entered in your books as being accepted?

Mr. Larkin: I object to that. The books will show what the entries are.

The Special Commissioner: I will take the testimony.

Mr. Larkin: Exception.

The Witness: Most of them have been.

1933

Q. Which ones have been entered as having been accepted? A. I presume all, except the last Weiss draft was drawn on the 25th of October.

Q. Mr. McLean, you had charge of the sales, I think you said—of the selling of exchange for Kessler of New York? A. I did.

Q. Do you remember whether or not you sold any exchange on the 28th of October? A. I did.

Q. How much did you sell that day? A. I could look it up.

By the Special Commissioner:

Q. Didn't you have a memorandum there? A. I did, yes.

By Mr. Larkin:

Q. What book? A. Right in the journal.

The Special Commissioner: Take your memorandum.

By Mr. Elkus:

Q. Refresh your recollection by looking at the memorandum?

By the Special Commissioner:

Q. Yes. You have made the memorandum from your books? A. Yes.

1935

The Special Commissioner: The 28th of October?

Mr. Elkus: The 28th, Monday.

The Witness: About \$31,000 worth were completed of transactions.

By Mr. Elkus:

Q. You mean you bought and sold \$31,000? A. No; we actually sold and paid for—

Q. How much was sold, but not paid for? A. Why, somewhere in the neighborhood of \$225,000.

1936 Q. In addition? A. In addition.

Q. Did you sell any exchange on the 25th of October? That was the preceding Friday? A. I did.

Q. How much? A. About \$190,000 worth.

Q. On the 25th? A. Yes.

Q. Saturday, the 26th, you didn't do any exchange business, did you? A. I did not.

Q. Do you do exchange business, as a rule, on Saturdays? A. Sometimes.

Q. What is the rule, generally, about it? A. Ordinarily, there is very little done.

Q. On Saturdays? A. Yes.

1937 Q. Did you sell any exchange on the 29th? A. The 29th was Tuesday?

The Special Commissioner: Tuesday.

The Witness: There was some sold.

Q. How much? A. I couldn't state that without——

Q. Without what? A. Without looking at the draft book.

Q. Have you got that book here? A. No.

Q. Have you any recollection of it at all? A. Why, I couldn't say. There was some sold. I couldn't say how much it was.

Q. Was it \$25,000, or \$50,000 or \$100,000? A. I
1938 really don't remember.

Q. The transactions which took place on the 25th of October were completed transactions, were they? A. They were paid for.

Q. They were paid for? A. Yes.

Q. Were these transactions of which you have told us on the 25th, the 28th and 29th in the ordinary course of business? A. They were.

A. And carried on in the usual way? A. Yes.

Q. And was the business of Kessler & Company, so far as you know, in those days, carried on in its usual and ordinary manner? A. Yes.

Q. On the 24th, how much exchange was sold? 1939

A. I don't remember.

Q. Don't you know? A. No.

Q. Can you refresh your recollection by looking at the book? A. Not by that book (indicating).

Q. What book? A. Well, I should have to refer to the drafts—in which the drafts were entered—but ordinarily there is no steamer going out, no exchange paid for on a Thursday, and ordinarily most of the transactions made on Thursday would be in that book as made on Friday.

By Mr. Larkin:

Q. Thursday—what day of October? A. The 1940 24th.

By Mr. Elkus:

Q. You mean to say that a transaction made on Thursday would not be consummated until Friday? A. Friday or Saturday.

Q. As a rule? A. As a rule.

Q. Was there any exchange sold on Saturday, the 26th? A. Not that I know of.

Q. Can you tell by looking at the book? A. No, I cannot.

Q. Looking at the draft book? A. If it was drawn on the 26th, the draft book would show it.

1941

By Mr. Larkin:

Q. Where is that draft? A. Where is it?

Q. Yes. A. It is down in the office.

FREDERICK C. BRETTSCHEIDER, a witness called on behalf of the Receiver, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. LARKIN:

Q. You were connected with Kessler & Company of New York? A. Yes.

1942 Q. How long had you been employed by them?
A. Sixteen years.

Q. And you continued in their employment down to the time of the assignment, October 30th? A. Yes.

Q. And after that, with the assignee? A. Yes.

Q. And after that with the Receiver until what time? A. First part of December.

Q. And you are now employed by Knauth, Nachod & Kuhne? A. Yes.

Q. What was your duty during the last years of your employment? A. I was a bookkeeper.

By the Special Commissioner:

1943 Q. Head bookkeeper? A. We had three bookkeepers.

Q. You had the general supervision of the books? A. Yes.

Q. And were the head bookkeeper? A. Yes.

By Mr. Larkin:

Q. Will you tell the Referee, please, what these two books are that are before you now—the credit and debit journals No. 11, of Kessler & Company? A. Those are the two journals. We used to receive the slips every afternoon at 3 o'clock, and they were entered in those two books.

1944

By the Special Commissioner:

Q. Those are the books of original entry? A. The slips are original entries.

Q. Those are not books? A. Well, the entries in the books, yes.

By Mr. Larkin:

Q. You have referred to some slips. Were those slips handed into your department every day at 3 o'clock? A. Yes.

Q. Then what happened? A. We sorted them,

and we entered them. This debit journal Mr. 1945 Hertle kept, and the credit journal Mr. Brooke kept.

Q. What had you to do with these people, with these books? A. Well, in general, we had three ledgers—foreign, sundries and general ledger. The general ledger was kept by Mr. Brooke and the sundries ledger by Mr. Hertle, and the foreign ledger by myself.

By the Special Commissioner:

Q. You had general supervision of the whole thing? A. Yes; if they had a difference, I had to look it up.

1946

By Mr. Larkin:

Q. Are you able to state whether or not—whether these entries made between the 25th, to and including the 30th, correctly set forth the transactions and were properly made at the time? A. Well, they were properly made at the time.

Q. And made from day to day? A. Yes.

By the Special Commissioner:

Q. The books were correctly kept, weren't they? A. Yes.

Q. And you had a trial balance every day or 1947 every other day—how often? A. Twice a week.

By Mr. Elkus:

Q. All the entries were correctly made, weren't they? A. Yes; it checked itself. One book had—

Q. All the books were correctly kept? A. Yes.

Mr. Larkin: I offer these pages from October 25th to and including October 30th—debit and credit journals.

Mr. Elkus: I object to that as not evidence against Kessler & Company, Limited; incompetent,

1948 immaterial and irrelevant. I object to it further upon the ground that it is not the proper way of proving insolvency and no proper foundation has been laid for this evidence. They have not proved any insolvency on October 30th or on any date.

Objection overruled. Exception.

Mr. Larkin: These pages are in the debtors' journal, starting with page 44, beginning with the date October 25, 1907, to and including the last entry on page 52 under date of October 30, 1907. In the credit journal, beginning with page 40, under date of October 25, 1907, to and including page 45, taking in the last entry on that page, under date of October 30, 1907.

Mr. Elkus: I object further upon the ground that entries in the books of any transactions are not the best evidence of the transactions, and as admissions, they are not admissions of Kessler & Company, Ltd., of Manchester.

Objection overruled. Exception.

Received in evidence and marked, respectively, Receiver's Exhibits 74 to 88, inclusive.

CROSS-EXAMINATION BY MR. ELKUS:

Q. You had general charge, I think, of all the books for the last two years of Kessler & Company?
1950 A. Yes.

Q. And all those books were correctly kept? A. Yes.

Q. And the entries in them correctly represented the transactions of the firm? A. I cannot answer that, because we only made entries from the slips we received.

Q. Then, do you mean to say that the entries which have been put in evidence are not correct? A. No.

Q. Well, are they correct? Which is it? Are they correct or incorrect? Is that the case, that

every entry in your books, that they are correct 1951
transactions from the slips handed to you? A.
Copies from the slips.

Q. That is all you know—that they are all cor-
rect transactions? A. Yes.

Q. You don't know whether the transactions are
correct or not? A. Some of them I do. They are
checked up with the letter books.

Q. And some you do not? A. Yes.

Q. That is all you know about it, then? A. Yes.

Q. But, as far as those transactions from the
slips go, they were correctly transcribed? A. Yes.

Mr. Elkus: Now, I move to strike out his evi-
dence on the ground that the book entries are 1952
shown to be incompetent.

The Special Commissioner: I deny your motion.

Mr. Elkus: Exception:

Q. You were employed by the assignee after the
general assignment? A. Yes, sir.

Q. And did you work under the direction of Mr.
Cooke, the accountant? A. Yes.

Q. Did you prepare a statement from the books
of the assets and liabilities of Kessler & Company?
A. No.

Q. Who prepared that? A. I understand Has-
kins & Sells.

Q. Didn't you have something to do with getting 1953
it out? A. No.

Q. Weren't you at work on it at all? A. Just
on the foreign statements we received, the check-
cuts from foreign accounts.

Q. You furnished some information to Mr.
Cooke? A. Yes.

Q. He did the work—Mr. Cooke himself. A. And
his assistants.

Q. Did you see the statement after it was pre-
pared? A. No.

1954 NORTH McLEAN (Cross-examination resumed).

The Witness: May I make a correction in my testimony?

The Special Commissioner: Yes.

The Witness: The amount I stated as having been sold on Monday, the 28th of October, was smaller than I stated because a number of items were made on the 29th.

By Mr. Elkus:

Q. Give us the amount on the 28th and 29th, separately, after you have examined the draft book?

1955 A. The amount on the 28th seems to be about \$122,000 and the amount of the 29th to be about \$124,000.

Q. And how much on the 25th and 26th? You had better begin with the 24th, 25th and 26th—those three dates? A. On the 24th, about \$1,000; \$149,000 on the 25th; on the 26th, \$39,000; on the 30th, \$8,000.

Q. Did you have any difficulty or trouble in selling this exchange on the 25th, 26th and 28th? A. No special difficulty.

By Mr. Larkin:

Q. No difficulty that you could not overcome? A. 1956 No.

By Mr. Elkus:

Q. Can you tell us the amount of business transacted by Kessler & Company in dollars and cents for the year 1907—from January 1st to October 30th? A. I looked that up awhile ago. The amount is about \$161,000,000.

By the Special Commissioner:

Q. Exchange business? A. No, all business.

By Mr. Elkus:

1957

Q. From January 1st, 1907, to October 30th, 1907. A. Yes, sir.

By Mr. Larkin:

Q. \$161,000,000? A. \$161,000,000.

By the Special Commissioner:

What proportion of that was exchange? A. I could only guess at that—four-fifths, probably; possibly more.

By Mr. Elkus:

Q. What was your average bank balance? A. I worked out the average bank balance at the same time, but I have forgotten what it was. 1958

Q. Will this (showing paper to witness) refresh your recollection? A. It will. Those are my figures—\$146,000.

Q. Per day—that was the average bank balance per day? A. Yes, sir.

Q. Did you have any difficulty of any kind in selling all the exchange you wanted to sell on Friday, the 25th of October?

Mr. Larkin: I object to the form of that question, on the ground it is leading and putting the answer right into the witness' mouth. 1959

Q. Did you or didn't you have any difficulty or trouble in selling all the exchange you wanted to sell?

The Special Commissioner: You mean all they offered?

Mr. Elkus: Yes, all they offered.

The Special Commissioner: You can take it in that way.

The Witness: I don't remember whether I offered any more than I sold or not.

1960 By Mr. Elkus:

Q. What is your best recollection? A. My best recollection is that I sold all I wanted to.

REDIRECT-EXAMINATION BY MR. LARKIN:

Q. You have referred to some figures here showing the average bank balance as you judged it. At whose request did you make those figures out? A. Mr. Seymour, I think.

Q. Attorney for the bankrupt? A. Yes.

Q. And at whose request did you make an estimate of the amount of business transacted by Kessler & Company from the 1st of January, 1907? A. 1961 The same gentleman's request.

Q. Did he ask you to get up any other figures than those? A. I think not.

Mr. Elkus: I may say that Mr. Seymour just handed that to me and asked me to ask those questions.

Q. You have referred to some sales of exchange made on the 24th of October. Was that a sight draft? A. I can tell you what it was by referring to those books.

Q. Just refer to the books? A. They were all sight drafts.

Q. The drafts on the 25th of October? A. Were 1962 all sight drafts except the one sold to Weiss.

Q. And that is a very small amount, wasn't it? A. \$654.

Q. Now, October 26th? A. October 26th, the only sale was a cable transfer.

Q. That was a cash transaction? A. Yes.

Q. Wasn't it? A. Yes.

Q. To whom was that \$39,000 cash cable transaction sold? A. Lazard Freres.

Q. Is that on London? A. No, sir—Paris.

Q. And on Monday, the 28th, you mean whether they were sight or—whether they were sight or

time? A. Monday, the 28th, there was one draft ¹⁹⁶³ of 724 pounds—about \$3,400, 90 days' sight. There was a cable transfer of about \$75. All the rest were sight.

Q. October 29. A. All sight drafts.

Q. And October 30th? A. All sight drafts.

Q. Why is it you sell sight drafts sometimes and and time drafts others? A. The ordinary exchange transaction is a sale of a sight draft, which is covered in many ways.

Q. Well, in other words, you can sell sight when you cannot sell time drafts?

Mr. Elkus: I object to that. He has not said that. 1964

Objection overruled. Exception.

The Witness: It does not follow at all.

Q. You have been testifying, Mr. McLean, in regard to the sale of certain exchange from the 25th of October down to the 30th? A. Yes.

Q. Do you mean to state to the Referee that during that period of time it was easier for you or as easy for you to sell time drafts as sight drafts?

Mr. Elkus: I object to that. It is incompetent, immaterial and irrelevant; calls for his conclusion.

Objection overruled. Exception.

A. I do not. 1965

Q. Isn't there a better market, an easier market, for the sale of sight drafts than time drafts?

Same objection, ruling and exception.

The Special Commissioner: At this time you are speaking of, in October, 1907.

The Witness: It is not an easy question to answer accurately, but, in general, no.

Q. Isn't it easier to sell sight than time drafts?

Same objection, ruling and exception.

A. In general, no.

1966 Q. I am speaking now of these dates, Mr. McLean. I am speaking now of the facts in regard to the sale—of the comparative ease with which you can dispose of sight drafts as compared to time drafts, from the 25th to the 30th of October? A. I have answered the question.

Q. You answer the question in the same way, do you? A. Yes.

Q. That you can sell time drafts as well—that you could sell them as well between October 30th and October 25th as you could sell sight drafts? A. In a general way, yes.

1967 Q. What do you mean in “a general way?” Why do you qualify your answer in that way?

Same objection as before, same ruling. Exception.

A. Because I did not want to make a mistake. I want to answer your question and do not want to make a mistake.

Q. I have given you an opportunity to explain just what you mean by it. A. Well, if I had 50,000 pounds to sell at those dates, drawn on a prime London bank, I could have sold it more readily, or a little more readily, than I could 50,000 pounds of demand drawn on the same prime London bank.

1968 Q. Is it better for Kessler & Company to sell sight drafts than time drafts?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant, and as calling for the conclusion of the witness, and the question is too vague and indefinite.

Q. Kessler & Company, in selling sight drafts, have just so much time to meet them? A. Yes.

Q. And intermediate of the time of the receipt of money for the drafts and the due date of the drafts, they have an opportunity of making arrangements to meet them, haven't they? A. Yes, they have.

Q. You knew, Mr. McLean, that in the week of

the 24th of October—beginning the 21st of October 1969—in the following week, Kessler & Company, had large obligations to meet in London and elsewhere?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant.

Q. What you call a large amount of cover to take care of?

The Special Commissioner: You may answer that.

Q. During the week of— A. Not an unusually large amount.

Q. I did not ask you that. A. No, they did not have a large amount. 1970

Q. Did they have any amount at all to meet on the other side, beginning the 21st? A. They did.

Q. How much did they have to meet during the week beginning the 21st of October?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant; not the proper way to prove it.

Objection overruled. Exception.

Q. Can you refer to your books and state? A. Why, I could not get it all. I don't know whether I could get it all from this book or not. I should say, off-hand, that there was probably, during that 1971 week, in the neighborhood of five, six, seven hundred thousand dollars.

Q. During the week of October 21st? A. The week ending October 26th.

Q. Now, and that had to be supplied in cash, hadn't it, or its equivalent? A. Yes.

Q. Or it had to be renewed? A. Yes.

Q. How much did you have coming due during the week commencing October 28th? A. Why, I should say in the neighborhood of \$500,000.

Q. \$500,000? A. Yes.

Q. That made, in your judgment, something up

1972 wards of a million dollars to meet during those two weeks? A. It did.

Q. Do you happen to know whether your bank balance at that time averaged \$124,000? A. Which time?

Q. During the last two weeks? A. I don't know, but I should think it averaged considerably more than that.

Q. Were you aware of any other obligations that the firm had to meet on the other side of the water during those two weeks beginning October 21st and 28th? A. I was.

Q. And how much did they amount to? A. \$100,000.

1973 Q. And to the Central Trust Company? A. Yes.

Q. Anyone else? A. I don't think of any other.

Q. Did you know that the Cripple Creek Central Railway Company had a deposit of upwards of \$120,000, which was being checked out against some time beginning the 21st of October?

Mr. Elkus: I object. That may call for a conclusion.

Objection overruled. Exception.

A. I knew that they had about that amount.

1974 By the Special Commissioner:

Q. On deposit with Kessler & Company? A. On deposit with Kessler & Company.

By Mr. Larkin:

Q. And in Kessler & Company's bank accounts, which you have referred to? A. Yes.

Q. And if their average was \$140,000 and the Cripple Creek had on deposit \$120,000, there was very little equity left in Kessler & Company?

Mr. Elkus: I object to that.

1975

Objection overruled. Exception.

A. Yes. Corrected page 895.

Adjourned to January 8th, 1908, at 11 A. M.

NEW YORK, January 8, 1908, 11 A. M.

Met pursuant to adjournment.

Same appearances.

1976

NORTH MCLEAN (redirect-examination resumed).

The Witness: I wish to make a correction in my testimony. The answer to the last question on page 894 is "Yes," but I do not think I answered "Yes"; or, if I did answer "Yes," I misapprehended the question.

By the Special Commissioner:

Q. What answer do you want to give to the question? A. The average bank balance might be taken as similar to the cash on hand by a national bank. There is not a national bank or a banker or a trust company that can pay in cash. That answer is 1977 very deceptive—that is all.

Mr. Larkin: I move to strike that out.

The Special Commissioner: No, that is all right—that answer.

Q. Assuming that the Cripple Creek Railway Company had a deposit with Kessler & Company in October, 1907, of \$120,000, how much more than \$120,000 was there of cash in the bank or banks belonging to Kessler & Company?

1978 Mr. Elkus: I object to that question, with your Honor's permission, on the ground that at that time there was more than \$140,000 in the bank.

The Special Commissioner: I say, assuming that the Cripple Creek Railway Company had \$120,000, how much more cash, over and above that, did Kessler & Company have in the bank in October, 1907?

Mr. Elkus: I object to the question on the ground that it is purely argumentative and assuming a state of facts as to that particular time which is contrary to the evidence and as incompetent, immaterial and irrelevant. The part I object to is the part which assumes that the balance on October 21st and thereafter during that week was \$140,000.

1979 The Special Commissioner: I said, assuming that the Cripple Creek Railway Company had \$120,000 on deposit, how much more cash—money—did you have in your various banks at the time inquired about?

Mr. Elkus: There is no objection to that. That question is all right.

The Witness: October 21st?

By Mr. Larkin:

Q. Don't you want to refer to the two journals?

A. I have got the figures here.

1980 Q. From the two journals? A. Yes; I have got the figures here. I will look at the journals, however. October 21st, about \$21,000; October 22nd, about \$66,000; October 23rd, about \$131,000; October 24th, about \$148,000; October 25th, about \$44,000.

By Mr. Elkus:

Q. Over and above the \$120,000? A. Over and above the \$120,000, which you assumed they had on deposit.

By Mr. Larkin:

1981

Q. Now, you know, do you not, that Kessler & Company had accounts payable to their customers by check.

Mr. Elkus: When?

The Special Commissioner: Other deposits besides the Cripple Creek.

The Witness: Only small deposits.

Mr. Larkin: I asked him whether he knew they had accounts.

By the Special Commissioner:

Q. You do know, do you? A. Yes.

1982

By Mr. Larkin:

Q. Do you know the amount of the accounts in dollars and cents? A. I do not.

Q. What book will show that? A. Why, the ledgers would show it, if you knew what accounts were subject to check.

Q. Do you know what accounts were subject to check? A. With the ledger before me, I would know.

By the Special Commissioner:

Q. What ledger do you wish now—the general ledger, or what ledger? A. Well, the Sundries. I think everything would be in the Sundries ledger; that ought to answer.

1983

By Mr. Larkin:

Q. The trial balance? A. Yes.

Q. The 30th? A. The trial balance—the Sundries trial balance—was made up about twice a week; it wasn't made up every day.

Q. And was it entered in the Sundries book? A. The Sundries ledger was posted every day, but

1984 the balance on the Sundries ledger accounts was only made up about twice a week.

By the Special Commissioner:

Q. You mean the trial balance? A. The trial balance of those accounts—that class of accounts.

By Mr. Larkin:

Q. Now, you begin to give the bank balances, commencing with October 21st, didn't you? A. That was what I was asked.

Q. And did you take them down to the 30th? A. To the 25th.

1985 Q. Continue after the 25th, and take it down to the 30th.

Mr. Elkus: I object to that as too remote and in no way affecting Kessler & Company of Manchester; it is incompetent, immaterial and irrelevant.

Objection overruled. Exception.

Q. What is it on the 26th? A. What is what?

Q. The cash balance on the 26th of October? A. \$86,000.

Q. What is the cash balance as shown by the books on the 27th? A. In the Sundries?

1986 Q. October 28th? A. \$82,000. On the 26th it is \$85,759.71.

Mr. Elkus: I make the same objection to each of these questions.

The Special Commissioner: Yes; the same ruling and you may have an exception.

The Witness: On the 28th, \$81,949; on the 29th, \$81,310.49.

Q. Now, on the 30th, the day of the assignment?

A. The 30th—that was the day of the balance.

Mr. Elkus: I specifically object to that on the 1987 ground that business was not carried on on that day.

Objection overruled. Exception.

The Witness: October 30th, \$59,911.79.

By the Special Commissioner:

Q. You say there was—— A. Cash in bank.

Q. How much money went into the hands of the assignees? Do you know that? Do you know as a matter of fact? A. I know this—if you want an explanation—each one of the banks where we held balances also held loans on them—took the balance against their loan. 1988

Q. How much cash did the assignee receive? A. I can't tell.

Q. You don't know? A. I don't know.

Q. \$58,520.22, isn't it? A. From the assignee to the Receiver?

Q. No, to the assignee? A. \$59,911.79. Now, the banks where this money was deposited held loans and appropriated the balance on account of their loans, so that the money was not handed over to the assignee or Receiver.

Mr. Elkus: The accountant says about \$20,000 actually handed over. The banks kept the balance. I don't know whether that is correct or not, but 1989 that is Mr. Cook's statement.

By Mr. Larkin:

Q. On one of these days, you had a large—a much larger bank balance than on other days, didn't you? A. The bank balance varied from day to day.

Q. Well, you had a bank balance of \$200 and odd thousand dollars, didn't you? A. I think we did on two or three of the days.

Mr. Elkus: About the 23rd or 24th.

Mr. Larkin: It was on the 24th.

1990 Q. That bank balance on the 23rd and 24th was derived by the sale of exchange, wasn't it? A. I don't know.

Q. Can't you refer to your books and tell? A. Yes.

Q. Please refer to your books and see whether you didn't sell exchange on or about those dates which resulted in an increase of your cash balance in the banks.

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant.

By the Special Commissioner:

1991 Q. What business did you do on the 22nd and 23rd in the matter of exchange?

Mr. Elkus: Same objection, as incompetent, immaterial and irrelevant; too remote.

Objection overruled. Exception.

Q. That would be cases of sales of exchange? A. I will have to go over all these items in both books. It appears from hasty examination of these books that on the 22nd we collected money for \$164,000 worth of exchange, and we paid out \$168,000. On the 23rd we collected \$291,000 and paid out \$163,000, about.

1992 Q. Wouldn't that make a balance to the good—that is to say, of sales over purchases—of about \$40,000, as I make it out? A. I make it that the total sales for the two days were about \$450,000, and the total purchases for the two days were about \$331,000.

Q. Are you sure those figures are right—I mean to say as you gave them? A. Why, you can read them back.

Q. What is the excess of sales over purchases? A. \$124,000.

By Mr. Larkin:

1993

Q. What do you mean by "purchases"? A. Cash paid out for bills of exchange.

Q. Cash paid out for bills of exchange which you transferred to the other side? A. Yes.

Q. To cover obligations due from Kessler & Company to the other side? A. Yes.

Q. So that the result of these transactions was, as you have testified, that the exchange sold realized an amount sufficient to purchase exchange to satisfy obligations on the other side due from Kessler & Company and leave a balance of about \$120,000? A. Yes.

Q. What did you find was the exchange bought 1994 and sold on the 24th and 25th of October? A. On the 24th of October there was paid for \$113,000—paid into Kessler & Company—and paid out \$48,000, leaving a balance of \$65,000 paid to Kessler & Company.

Mr. Elkus: I make the same objection.

Same ruling. Exception.

Q. On the 25th there was a large amount, however, paid out by Kessler & Company, wasn't there, by cable? A. There was nothing sold and \$97,000 paid.

Q. What about \$48,600 transferred by cable? A. 1995 You are asking——

Q. I am asking you about \$48,600. A. That money was not received.

By the Special Commissioner:

Q. Whether it diminished your—whether that transfer diminished your bank account? A. No; it did not affect the bank account either way.

Mr. Elkus: I want to make an objection to that specifically. If you are going to take disjointed items, you are going to have a hopeless confusion.

1996 The Witness: I will look at that and see.

Mr. Elkus: I object to your looking at it; I object to that testimony being given.

Q. Whether that diminished your bank balance.

A. Here is the item on the other side—the same amount—\$48,000 on each side.

By Mr. Larkin:

Q. Why do you put an entry on one side and then take it on the other?

1997 Mr. Elkus: I object to this as incompetent, immaterial and irrelevant; too remote, and this method of taking disjointed entries from the books and asking explanations of them is not the proper way of proving the case, or trying to prove it. It simply results in endless confusion.

The Special Commissioner: You may answer the question.

Mr. Elkus: Exception.

The Witness: It was an amount transferred—an amount of 10,000 pounds transferred from Glyn, Mills, Currie & Company to Kessler and Company, Ltd., of Manchester.

1998 Q. Well, now, without going through the remaining days, Mr. McLean, are you able to say whether these drafts which you have referred to were or were not returned unaccepted by Glyn, Mills, Currie & Company?

Mr. Elkus: I object to that as immaterial and irrelevant.

The Special Commissioner: What transactions are you referring to?

Mr. Larkin: Referring to the sale of exchange of the 22nd and 23rd and 24th, as to which he has testified.

The Special Commissioner: Now, doesn't he say

that the exchange was all drawn on Glyn, Mills, 1999
Currie & Company?

Mr. Larkin: He has not so stated.

Q. Is that the fact? A. It was not all drawn on
Glyn, Mills, Currie & Company.

Q. How much of it was not drawn on Glyn, Mills,
Currie & Company? A. I would have to go through
those books to find out.

Q. Was it any substantial amount? A. I don't
know. It might have been \$25,000, \$50,000, \$100,
000. I can't remember the details of the business
of that time.

Q. I don't ask you to remember it. A. I could
look it up. 2000

Q. I am asking you, if you please, to look in the
books and tell me how much of these bills which
were sold by you, as you have testified, were sold
against Glyn, Mills, Currie & Company?

Mr. McLaughlin: What date?

Mr. Larkin: On the 22d or 23rd.

Mr. Elkus: I object to this as putting in evidence
the contents of these books, as incompetent, imma-
terial and irrelevant.

Objection overruled. Exception.

The Witness: On the 22d demand drafts on Glyn,
Mills, Currie & Company were sold to the amount 2001
of about \$90,000. That is, on the 22d Kessler &
Company were paid for demand drafts on Glyn,
Mills, Currie & Company for about \$90,000. They
were paid for cable transfer drawn on Glyn, Mills,
Currie & Company about \$73,000.

Q. Making a total of? A. \$163,000. On the 23rd
Kessler & Company received money for demand
drafts drawn on Glyn, Mills, Currie & Company to
the amount of about \$219,000.

Q. All these amounts, without going through the
remaining days to the 30th—do you know whether

2002 those drafts were paid by Glyn, Mills, Currie & Company?

Mr. Elkus: I object to that as immaterial and irrelevant, and on the same ground as before.

The Special Commissioner: I will allow it.

Mr. Elkus: Exception.

A. The drafts paid for on the 23rd were not paid, and I presume none of those paid on the 22d were paid by Glyn, Mills, Currie & Company.

By the Special Commissioner:

2003 Q. They could not have—— A. The 23rd could not have. The ones that were paid for on the 22d could have.

Q. Do you know, of your own knowledge, whether they were paid or not. A. Not without looking them up in the ledger to see which items came back.

By Mr. Larkin:

Q. You do know that these items did come back or some part of them? A. All those paid for on the 23rd came back.

Q. I mean the cable transfer of \$73,000 was paid by Glyn, Mills, Currie & Company on the 22nd? A. Yes.

2004 Q. And the \$90,000 drafts were the ones that you say you presume were not paid, either? A. That is correct.

RECROSS-EXAMINATION BY MR. ELKUS:

Q. You said, in answer to Mr. Larkin, that there were liabilities of Kessler & Company during the week beginning October 21st of \$600,000. Can you say whether or not those liabilities were paid? I mean they were paid on maturing? A. All liabilities due by Kessler & Company during the week beginning October 21st were paid exactly as they matured.

By Mr. Larkin:

2005

Q. You mean the liabilities—these exchange liabilities? A. Liabilities of any kind.

By Mr. Elkus:

Q. They were paid exactly when due? A. They were.

Q. As they matured? A. Yes.

Q. You were asked whether there were accounts payable subject to check due by Kessler & Company during the week beginning October 21st, and you said there were. Can you say whether the amounts of those deposits were small or large? A. Small. 2006

Q. What do you mean by "small"—less than what sum? A. As an estimate, less than \$25,000 to \$50,000—outside of the ones inquired about.

Q. Now, were checks drawn against those bills paid as they were presented? A. They were.

Q. Now, with reference to the balances in the banks on the 21st, 22d, 23d, 24th and 25th of October, I wish you would give me the exact balances on those days. A. I will have to do that from the journal.

Q. Yes; just read them off. A. 21st, \$140,590.-89; 22d, \$185,635.88; 23d, \$253,787.63; 24th, \$267,975.13; 25th, \$163,906.50; 26th, 85,759.71.

Q. You have given the 27th, 28th, 29th and 30th. 2007
With reference to the sales of exchange on the 28th, 29th and 30th, you have given the amount of sales. Do you mean to say that you received the sums which you stated the bills of exchange were sold for on those days or held any checks returned. A. I do not recall sufficiently what the figures were to be able to answer the question.

By the Special Commissioner:

Q. Do you know, of your own knowledge, whether any checks were returned? A. I know of

2008 my own knowledge a number of checks were returned.

By Mr. Elkus:

Q. What checks were returned, what amount, and to whom and when? A. There were returned on Wednesday afternoon, the 30th of October, checks that I should think would aggregate something over \$200,000—something between \$200,000 and \$250,000.

Q. Were those the only checks returned on the afternoon of the 30th of October or did you return any checks before that time? A. No checks were
2009 returned before that time.

Q. And those transactions for which those checks were delivered to you but returned took place when? A. The transactions took place on the 28th and 29th of October.

By the Special Commissioner:

Q. Your testimony would imply there was one small transaction, \$8,000, on the 30th. A. The check for that, according to my recollection, was never received. It was not due until the following day after the assignment.

2010 By Mr. Elkus:

Q. Your testimony reads that transactions of the sale of exchange which took place on the 28th, 29th and 30th, were complete transactions. Did you mean by that to testify that the money had been actually received and not returned? A. I should have testified, and presume I have testified, and mean that the transactions which I classed as complete were transactions on which the money was received and deposited.

Q. Then you are in error about this \$8,000? You testified that was a complete transaction on the

30th. A. If I testified to that fact in that way, I 2011
was in error.

Q. Did you get any instructions as to returning
checks for exchange which you had sold on the
28th and 29th—as to what checks should be re-
turned? A. No.

Q. Did you return them of your own volition or
did somebody tell you to return them? A. There
was some conference about it.

Q. Didn't Mr. Alfred Kessler tell you to return
all checks which came in after noon of October
30th? A. The checks were returned with those
that came in after noon on the 29th. They were
returned on the afternoon of the 30th.

Q. All transactions which were not completed by 2012
receipt of a check before noon of October 29th were
not finally completed by Kessler & Company, al-
though they had the checks in their possession,
but they returned the checks on the 30th? A. That
is correct.

Q. And they had checks in their possession for
from \$200,000 to \$250,000 from October 29th until
October 30th? A. That is correct.

Q. And it was in their power to deposit them
and use the money? A. That is correct.

Q. Assuming that you sold exchange on the 28th,
when would you receive a check for it in the ordi-
nary course of business? A. In the ordinary course 2013
of business, but not always, on the 29th. In excep-
tional cases, the money would be received the same
day.

Q. Usually it was the day following the trans-
action? A. Yes.

Q. So that, with reference to these checks which
you received on the 29th and returned on the 30th,
the exchange was sold on the 28th? A. Yes.

Q. Did Kessler & Company meet all obligations
as they matured on the 28th. A. They did.

- 2014 Q. And on the 29th? A. They did.
Q. Of October, I refer to. A. Of October.

By Mr. Larkin:

Q. Do you know all the obligations of Kessler & Company? A. I don't know that I know absolutely all of them. I know all of them that are of any material size.

Q. Do you know that they met the obligation with the Central Trust Company when it was called? A. I do.

Q. Do you know that they did not themselves—that they secured a new loan? A. I do not.

- 2015 Q. Do you know they met the obligation of the Mechanics' Bank? Do you know the Mechanics' Bank loan? A. I know the loan of the Mechanics' Bank; yes.

Q. Did they meet that? A. They did.

Q. And what was the other loan that Morgan took up for them? A. The loan of the City Bank.

Q. And when Mr. Morgan took up the loan, you mean to have the Referee understand that that is the way Kessler & Company met it? A. The loan was not called; no occasion to pay it.

Q. The Central Trust Company loan was called? A. That one was called.

- 2016 Q. When was that called? A. I think on the 25th or 26th, with a couple of days' notice.

Q. And when was it paid? A. On the 28th.

Q. Was the money used to pay that loan off derived from the sale of exchange?

Mr. Elkus: I object to that as immaterial and irrelevant. The money came out of the bank of Kessler & Company. It calls for the conclusion of the witness and not a fact.

The Special Commissioner: I will allow it.

Mr. Elkus: Exception.

A. Partly from exchange and partly from the sale of stocks purchased.

Q. Partly from cash on deposit by customers of 2017 Kessler & Company, wasn't it?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant and stating facts which the witness has not stated and which are not facts.

The Special Commissioner: I will sustain that objection.

Q. The answer was, in part by sale of exchange and part by sale of securities? A. Yes.

Q. And in regard to the Park Bank loan, do you know whether they met their obligation? A. The loan was not called.

Q. The loan was not called? A. The loan was 2018 not called.

Q. Do you know that? A. When there was talk of it, of calling it, it was arranged to let it stand.

Q. Did Mr. Alfred Kessler go to them and ask them to renew it, providing he paid half the loan—do you know that?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant. This witness was not present.

By the Special Commissioner:

Q. Do you know it of your own knowledge? A. 2019 I know what was told me only.

Q. Then you don't know it? A. I didn't go with Mr. Kessler to the bank, but I was told about it.

By Mr. Larkin:

Q. You stated that the deposit accounts with Kessler & Company subject to demand ran from about \$25,000 to \$50,000? A. That is my impression.

Q. Now, won't you take the Sundries ledger and just state the amount of those accounts during the last ten days of business?

2020 Mr. Elkus: I object to that.
Special Commissioner: Objection sustained.
Mr. Larkin: Exception.

Q. This ran from \$25,000 to \$50,000? A. Yes.

Mr. Larkin: I offer the schedules of the bankrupts in evidence.

Mr. Elkus: I object to them as incompetent, immaterial and irrelevant. They are not evidence as against Kessler & Company of Manchester, and the mere declaration of Kessler & Company, the bankrupts, with arbitrary figures as to values, does not prove the value of assets so as to show solvency or insolvency; and the putting in evidence of
2021 schedules does not establish the solvency or insolvency of Kessler & Company. The schedules themselves are not conclusive evidence and are not evidence of solvency or insolvency, and are incompetent anyhow. And, by making a specific objection, I do not wish to be understood as waiving a general objection.

Objection overruled. Exception.

Mr. Elkus: I want to object specifically to each and every schedule being admitted. My objection as to each is also upon the same grounds.

The Special Commissioner: Yes. The same ruling.
2022

Mr. Elkus: Objection.

Received in evidence and marked Receiver's Exhibit 74A.

Recess until 2.30 p. m.

AFTER RECESS.

HOWARD B. COOK (direct-examination resumed).

By Mr. Larkin:

Q. Since the last session when you were called, have you made a further examination of the transactions as shown by the journals, debit and credit,

No. 11, of Kessler & Company, between the 25th²⁰²³ of October and the 30th of October? A. I have.

Q. And are you able to state whether those transactions—what were the transactions you have examined, first?

Mr. Elkus: I object to that. We have testimony at first hand as to all those transactions; why have the testimony of this expert added to that?

Q. What were the transactions you have examined, first?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant, and not proving solvency or insolvency of Kessler & Company, the bankrupts, and not the proper way to prove it, not the²⁰²⁴ best evidence; no foundation laid for this question.

Objection sustained. Exception.

Mr. Larkin: I offer in evidence Receiver's Exhibit 38 for identification.

Mr. McLaughlin: We object. It is incompetent, immaterial and irrelevant, and specifically on the ground it has no relation to the transaction of October 25th, 1907, and no bearing upon the solvency or insolvency of Kessler & Company of New York, or with any issue in this case.

Objection overruled. Exception.

Received in evidence and marked Receiver's²⁰²⁵ Exhibit 38.

Mr. Larkin: I offer in evidence letter of February 15, 1907, Receiver's Exhibit 39 for identification.

Mr. McLaughlin: We object to it on the same grounds, as a letter containing absolutely nothing but general gossip in regard to the business of Kessler & Company of New York, at a time, eight or nine months, prior to the transaction involved in this claim.

Objection overruled. Exception.

Received in evidence and marked Receiver's Exhibit 39.

2026 Mr. Larkin: I offer in evidence Receiver's Exhibit 40 for identification, which is a letter dated the 18th of February, 1907, written by Kessler & Company, of New York, to Kessler & Company, Ltd., regarding the escrow, so-called. To that there is no objection?

Mr. McLaughlin: No, no objection.

Received in evidence and marked Receiver's Exhibit 40 for identification.

Mr. Larkin: I offer in evidence Receiver's Exhibit 41 for identification.

2027 Mr. McLaughlin: I object to the entire letter on the same grounds, and I object specifically to each paragraph, separately, of this letter offered in evidence on the ground it is wholly irrelevant; no issue in this case.

Objection overruled. Exception.

Received in evidence and marked Receiver's Exhibit 41.

Mr. Larkin: I offer in evidence Receiver's Exhibit 42 for identification.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 42.

2028 Mr. McLaughlin: I offer in evidence Receiver's Exhibit 43 for identification, letter of the 28th of March, 1907, to Willy Kessler.

Mr. Larkin: No objection.

Received in evidence and marked Qessler & Company, Ltd., Exhibit EE.

Mr. Larkin: I offer in evidence Receiver's Exhibit 44 for identification, a letter of April 8, 1907, to Willy Kessler.

Mr. McLaughlin: I make the same objections.

Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 44.

Mr. Larkin: I offer in evidence Receiver's Ex-2029
hibit 45 for identification, letter of the 1st of May,
1907, to Willy Kessler.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's
Exhibit 45.

Mr. Larkin: I offer in evidence Receiver's Ex-
hibit 46 for identification.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's
Exhibit 46.

Mr. Larkin: I offer in evidence Receiver's Ex-
hibit 47 for identification, a letter of Kessler & 2030
Company of New York, to Kessler & Company of
Manchester, relating to the escrow, dated the 8th
day of July, 1907.

Mr. McLaughlin: No objection.

Received in evidence and marked Receiver's
Exhibit 47.

Mr. Larkin: I offer in evidence Receiver's Ex-
hibit 48 for identification, a letter dated the 9th
day of July, 1907, to Willy Kessler.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's
Exhibit 48.

Mr. Larkin: I offer in evidence Receiver's Ex-
hibit 49 for identification, letter to Rudolf Flinsch,
dated the 23d day of July, 1907, from Alfred Kess-
ler. 2031

Mr. McLaughlin: I object to this on the ground
it is incompetent, immaterial and irrelevant, being
a letter from one of the partners of the New York
firm of Kessler & Company, to one of the other
partners and therefore not competent.

Mr. Larkin: These letters were received by Mr.
Flinsch prior to his interviews with Willy Kessler
in Baden-Baden and later in Manchester, and are

2032 offered for the purpose of showing what the subject matter of such conferences were.

The Special Commissioner: I admit the letters between Flinsch and Kessler, not as proof of the facts stated there against you, unless somehow or other you are connected with them by some other testimony, but as showing what knowledge they themselves had of the condition.

Mr. Larkin: Well, the Referee admits the letters between Flinsch and Alfred Kessler and also between Alfred Kessler and Flinsch?

The Special Commissioner: Yes, as showing their state of mind, showing what knowledge they
2033 had of their own affairs.

Mr. McLaughlin: I would like to have further objection noted to the admission of these letters on the ground it is not the proper way of proving their insolvency on October 25, 1907, or of proving knowledge of insolvency on that day by the bankrupts.

Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 49.

Mr. Larkin: I offer in evidence letter of the 30th of July, 1907, Receiver's Ex. 50, for identification.

Mr. McLaughlin: Same objection as to Ex. 49.

2034 Same ruling. Exception.

Received in evidence and marked Receiver's Ex. 50.

Mr. Larkin: I offer in evidence Receiver's Exhibit 51 for identification, letter of the 2d of August, 1907, to Flinsch.

Mr. McLaughlin: Same objection as to Exhibit 49.

Same ruling. Exception.

Received in evidence and marked Receiver's Ex. 51.

Mr. Larkin: I offer in evidence Receiver's Ex-²⁰³⁵hibit 52 for identification, letter dated the 2d of August, 1907, to Willy Kessler.

Mr. McLaughlin: I object to this on the ground it is irrelevant; no issue in this case. There is nothing contained in this letter that has any relevancy to any issue in this case, and it is too remote.

Objection overruled. Exception.

Received in evidence and marked Receiver's Ex. 52.

Mr. Larkin: I offer in evidence Receiver's Exhibit 53 for identification, letter of the 9th of August, 1907, to Rudolf Flinsch.

²⁰³⁶

Mr. McLaughlin: We object to this letter on the same grounds as stated in our objection to Receiver's Exhibit 49.

Same ruling. Exception.

Received in evidence and marked Receiver's Ex. 53.

Mr. Larkin: I offer in evidence Receiver's Exhibit 54 for identification, letter of the 20th of August, 1907, to Rudolf Flinsch.

Mr. McLaughlin: Same objection as to Exhibit 49.

Same ruling. Exception.

Received in evidence and marked Receiver's ²⁰³⁷Ex. 54.

Mr. Larkin: I offer in evidence Receiver's Exhibit 55 for identification, being letter to Willy Kessler under date of the 27th of August, 1907.

Mr. McLaughlin: I object to this on the ground it is incompetent, immaterial and irrelevant, and that it has nothing to do with the issues in this case.

Same ruling. Exception.

Received in evidence and marked Receiver's Ex. 55.

2038 Mr. Larkin: I offer in evidence Receiver's Exhibit 56 for identification, letter dated the 27th of August, 1907, relating to the so-called escrow.

Mr. McLaughlin: No objection to that.

Received in evidence and marked Receiver's Exhibit 56.

Mr. Larkin: I offer in evidence Receiver's Exhibit 57 for identification, letter of the 30th of August, 1907, from Alfred Kessler to Rudolph Flinsch.

Mr. McLaughlin: Same objection as to exhibit 49.

Same ruling. Exception.

Received in evidence and marked Receiver's Ex. 57.

2039

Mr. Larkin: I offer in evidence Receiver's Exhibit 58 for identification, letter dated September 3, 1907, to Manchester.

Mr. McLaughlin: I object to this on the ground it is incompetent, immaterial and irrelevant and entirely unintelligible.

Objection overruled. Exception.

Received in evidence and marked Receiver's Exhibit 58.

Mr. Larkin: I offer in evidence Receiver's Exhibit 59 for identification, letter of the 3d of September, 1907, to Flinsch.

2040 Mr. McLaughlin: Same objection as to No. 49.

Same ruling. Exception.

Received in evidence and marked Receiver's Ex. 59.

Mr. Larkin: I offer in evidence Receiver's Exhibit 60 for identification, letter dated the 6th of September, 1907, to Willy Kessler.

Mr. McLaughlin: I object to this on the same grounds as I objected to the first letter offered.

Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 60.

Mr. Larkin: I offer in evidence Receiver's Ex-2041
hibit 61 for identification, letter of September 17,
1907, to Flinsch.

Mr. McLaughlin: Same objection as to Exhibit
49.

Same ruling. Exception.

Received in evidence and marked Receiver's
Ex. 61.

Mr. Larkin: I offer in evidence Receiver's Ex-
hibit 62 for identification, letter of the 23d of Sep-
tember, 1907, from Kessler & Company of New
York to Kessler & Company of Manchester, relat-
ing to the escrow of 20,000 pounds.

Mr. McLaughlin: There is no objection to that. 2042

Received in evidence and marked Receiver's
Exhibit 62.

Mr. Larkin: I offer in evidence Receiver's Ex-
hibit 63 for identification, letter of the 27th of Sep-
tember, 1907, to Flinsch.

Mr. McLaughlin: Same objection as to Ex-
hibit 49.

Same ruling. Exception.

Received in evidence and marked Receiver's
Exhibit 63.

Mr. Larkin: I offer in evidence Receiver's Ex-2043
hibit 64 for identification, letter of the 2d of Octo-
ber, 1907, relating to the 20,000 pounds escrow.

Mr. McLaughlin: No objection to that.

Received in evidence and marked Receiver's
Exhibit 64.

Mr. Larkin: I offer in evidence Receiver's Ex-
hibit 65 for identification.

Mr. McLaughlin: No objection.

Received in evidence and marked Receiver's
Exhibit 65.

2044 Mr. Larkin: I offer in evidence Receiver's Exhibit 66 for identification, letter dated October 8, 1907, to Rudolf Flinsch.

Mr. McLaughlin: I object to it on the ground it is incompetent, immaterial and irrelevant, and particularly on the ground it is incompetent, being a letter between Alfred Kessler and Rudolf Flinsch, and is therefore not evidence of any fact as against us.

Objection overruled. Exception.

Received in evidence and marked Receiver's Exhibit 66.

2045 Mr. Larkin: I offer in evidence Receiver's Exhibit 67 for identification.

Mr. McLaughlin: I object to that on the same grounds as the first letter. On two grounds—first, that they are irrelevant; second, that they are incompetent, inasmuch as they are mere personal letters from Alfred Kessler to his brother Willy, and are not notice to this corporation.

Objection overruled. Exception.

Received in evidence and marked Receiver's Exhibit 67.

2046 Mr. Larkin: I offer in evidence Receiver's Exhibit 68 for identification, letter of the 17th of October, 1907.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 68.

Mr. Larkin: I offer in evidence Receiver's Exhibits 69, 70 and 71 for identification, dated the 25th of October, 1907, written by Kessler & Company of New York to Kessler & Company of Manchester, relating to the escrow.

Mr. Laughlin: No objection.

Received in evidence and marked, respectively, Receiver's Exhibits 69, 70 and 71.

Mr. Larkin: I offer in evidence Receiver's Ex-2047
hibit 14 for identification.

Mr. McLaughlin: I object to that as incompetent, immaterial and irrelevant and not binding upon us and upon the other grounds as before.

Objection overruled. Exception.

Received in evidence and marked Receiver's Exhibit 14.

Mr. Larkin: I offer in evidence Receiver's Exhibit 15 for identification, a letter from Flinsch to Alfred Kessler, dated July 1, 1907.

Same objection. Same ruling. Exception.

Mr. Larkin: I offer in evidence Receiver's Ex-2048
hibit 16 for identification, a letter dated July 5, 1907, from Flinsch to Alfred Kessler.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 16.

Mr. Larkin: I offer in evidence Receiver's Exhibit 17 for identification, letter dated July 11, 1907.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 17.

Mr. Larkin: I offer in evidence Receiver's Ex-2049
hibit 18 for identification, letter of July 18, 1907.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 18.

Mr. Larkin: I offer in evidence Receiver's Exhibit 19 for identification, letter of July 19, 1907.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 19.

2050 Mr. Larkin: I offer in evidence Receiver's Exhibit 20 for identification, letter of July 23, 1907.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 20.

Mr. Larkin: I offer in evidence Receiver's Exhibit 21 for identification, letter of July 26th, 1907.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 21.

Mr. Larkin: I offer in evidence Receiver's Exhibit 42 for identification, letter of August 1, 1907.

2051 Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 22.

Mr. Larkin: I offer in evidence Receiver's Exhibit 23 for identification, letter of August 2, 1907.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 23.

Mr. Larkin: I offer in evidence Receiver's Exhibit 24 for identification, letter of August 8th, 1907.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 24.

2052 Mr. Larkin: I offer in evidence Receiver's Exhibit 25 for identification, letter of August 9th, 1907.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 25.

Mr. Larkin: I offer in evidence Receiver's Exhibit 26 for identification, letter of August 15, 1907.

Same objection. Same ruling. Exception.

Received in evidence and marked Receiver's Exhibit 26.

Mr. Larkin: I offer in evidence Receiver's Ex-2053
hibit 28 for identification, letter of August 20,
1907.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's
Exhibit 28.

Mr. Larkin: I offer in evidence Receiver's Ex-
hibit 29 for identification, letter of August 27th,
1907.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's
Exhibit 29.

Mr. Larkin: I offer in evidence Receiver's Ex-2054
hibit 30 for identification, letter of August 30th,
1907.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's
Exhibit 30.

Mr. Larkin: I offer in evidence Receiver's Ex-
hibit 31 for identification, letter of September 3,
1907.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's
Exhibit 31.

Mr. Larkin: I offer in evidence Receiver's Ex-2055
hibit 32 for identification, letter of September 5th,
1907.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's
Exhibit 32.

Mr. Larkin: I offer in evidence Receiver's Ex-
hibit 33 for identification, letter of September 6,
1907.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's
Exhibit 33.

2056 Mr. Larkin: I offer in evidence Receiver's Exhibit

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's Exhibit 34.

Mr. Larkin: I offer in evidence Receiver's Exhibit 35 for identification, letter of September 26, 1907.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's Exhibit 35.

2057 Mr. Larkin: I offer in evidence Receiver's Exhibit 36 for identification, letter of October 5, 1907.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's Exhibit 36.

Mr. Larkin: I offer in evidence Receiver's Exhibit 37 for identification, letter of October 8th, 1907.

Same objection. Same ruling. Exception.
Received in evidence and marked Receiver's Exhibit 37.

2058 By mutual consent both parties have excluded from the letters such parts as appear to be purely personal and not relevant at all to the issues in this case.

Adjourned until January 14th, 1907, at 2 p. m.

(From the following letters have been omitted passages containing items of family or personal news and general gossip.)

**Receiver's Exhibit 14, Jan. 8/08,
J. O. N.**

2059

LONDON, Friday, June 28th, 1907.

Pr. Campania.

Messrs. KESSLER Co.,
N. Y.

DEAR SIRs:

We reached here after a good crossing late Monday 25th inst, finding your wire asking me to call on Mr. Gillette at the Grand Central Hotel. He, however, called early Tuesday morning and we have had several interviews since. I wired you on the 26th, Wed. A. M.

2060

"Agreement has been made (with) Gillette; (it) "will be signed this week; will telegraph. We have "made arrangements with Union Discount Co. "Discounts Gesellschaft (for) postscript; await arrival of mail per Saturday (tomorrow) Cripple "Creek Central (matter) progressing favorably; do "not tell Blackmer."

The Union Discount Co. will pay upon our cable advice of our mailing them a batch of bills up to £25,000 to Glyn's charging for the advance of funds until arrival of the bills the same rate of interest we may have engaged in advance from them for that batch of bills; if we did not engage the 2061 rate of discount they will charge for the entire 70 or 100 days the discount rate prevailing on the date of the payment. When bills are drawn on agencies, Trust Cos. or Commercial houses, U. D. want names and approximate amounts named in cable; this is not necessary with bills drawn on London bankers.

Discounts Gesellschaft do this business rather differently, i. e., they take check for cable at a difference of so many (say 70) points. They men-

2062 tioned City Bank, Londonbury, Thalmann, Bank of Commerce, and, I believe, also Hanover National, as doing this with them, the advances showing them (D. G.) recently up to $7\frac{3}{4}\%$ int. p. a. (!). I told both these institutions, that you would confirm the arrangement and would send them a code. This would seem to be a simpler code than anticipated by us, in view of only one rate of interest being charged by U. D. Mr. Cassidy there was very anxious to charge 1% over bank rate and made strong "Spiel" but Mr. Augent overruled him, having previously already consulted to the lower rate. With a "check" the discounts may mean other
 2063 bankers' check; this occurred to me only afterwards, and I did not want to go back the following day; you might try it out after a few transactions. He, Mr. Schroeder, said they had nearly \$300,000 out in that way at present.

Swiss Bank verein insisted on 1% above bank rate, and I therefore told Mr. Castelli there not to bother about writing to Basel in regard to it. Of course I made it plain to these people, that the bills for discount were in the mail the evening before they were expected to make the payment here.—Of course Union Discount hopes to be favored with more business and assure me they will do better on rates, having heard this complaint a
 2064 good deal lately.—Union Discount would like a confidential report about Irving National Exchange Bank, N. Y.

"Gillett signed; (he) says Somerset (J. W. & "S.) do not pay (to Pennsylvania) until his return "probably October when intends develop coal properties. Has Turnbull returned, Milne (is) now "conferring (at) (Frankfort) (with Jean) Andreac have made arrangements (with) Schencks "(that) your customers or you may draw £20,000 "loan against collateral (with) not less than margin of 20% upon your statement (that) collateral

"can be realized in case of non-payment within a
 "few days (say a week or two weeks); (Schenck)
 "will accept Orleans County Muskogee; (they)
 "will not accept Cripple (Creek) Maclea, Milne.
 "Tell Blackmer nothing can be done (with) Crip-
 "ple Creek unless 5% commission (is paid by ven-
 "dors)."

Regarding Orleans County Quarry bonds and Muskogee bonds I told Schencks that I considered they could be disposed of within a few days; they were satisfied with that. I wrote a copy of the cable out for them and they approved a copy of it. If you have any other similar securities, that you consider capable of sale within a reasonable time, and you feel like making the above state-
 ment regarding them, you can use them with Schenck. They like the Damiler Mfg. Co. Preferred stock collateral, better than the C. C. C.; having received a favorable report on the D. Mfg. Co. In writing to Schenck you may omit all other statements about the nature, earnings, etc., of these securities. I told them I wanted to cable you about it, because I assume that you wanted to draw forth-
 with before exchange rate has fallen much lower.

Regarding Milne, I heard from Mr. Henry Kessler that M. was in Paris and ready to start for Reichenberg. I wired him not to proceed any further without seeing me even here or at Fkt. We
 had some telegraphic correspondence he sent some
 letters, stating that he had an appointment with
 Jean Andrae (the father) at Fkt. yesterday. I
 have not yet heard the results. I wish I knew
 a little about sales from you; M. writes they were
 picking up there last two days. He has evidently
 not considered your cable asking for his return,
 of much import, as he seems to proceed on his tour.
 I shall wire him to Reichenberg to come to Fkt.
 as soon as I can reach there. Unfortunately I
 have to put off my departure for Frankft from here

2068 until Monday night, as I simply could not get through with the work. Mr. Gillett and the contract taking up a great deal of my time. I am to-night writing only about more pressing things, as I want to get something off by to-morrow evening. 11 o'clock is just striking at Westminster.

Anglo Foreign. I saw just before coming back from the city this evening. Here I found copies of their letter to you in your letter mailed 20th inst. They had shown me copy of their of 12th inst. I told them an estimate of 60 for C. C. C. stock was wide of the mark, etc., etc., and I did not settle anything with them, assuming that you 2069 would decline to entertain their figure of 60. I am rather at a loss what to do now, but I shall probably write them.

C. C. C. rather unexpectedly I found Mr. Barth quite interested after a while, in the possibility of doing something with these stocks in Belgium and Holland. My request by cable "Tell Blackmer nothing can be done Cripple (Creek "stocks) unless 5% commission," is in line with my arrangement with him and will make him get McNeill's and Fenrose's consent to pay such a commission, to which he has already agreed. Do not tell Mr. B. that I feel rather sanguine about this business. 2070 It is time to get very busy on this sale.

SATURDAY A. M. June 29.

Your cable just received "C. C. C. May net earnings "18000. Turnbull alright week sales \$10,000," for which I am obliged indeed and glad.

Kind regards to all at the office.

Yours truly,

R. FLINSCH.

Schencks say even if your first drafts and advices should be different from what they expected, they will accept draft, leaving a clearer under-

standing to the future and the correspondence. I 2071
told Schencks that I did not expect that D. Mfg.
Co. Pfd. would be used again.

Later.

Mr. Gillette has just been here to again sign the
final agreement and I have authorized him to draw
£1000 and shall soon advise Glyn's. All docu-
ments, etc., will go forward to Mr. Kessler within
the next week. You will probably have paid \$500
to Mr. Harold Gillette by the time this reaches you;
another \$500 are to be paid to him in August.
No other payments of any kind are to be paid by
you for Mr. Gillette's account. Mr. Gillette tells
me that he will return to N. Y. in Sept. (instead 2072
of October) and confirms the correctness of what
I cabled you yesterday regarding J. W. & S. I take
it that you will have Mr. Allen postpone the pay-
ment to the Pa. until October. R. FL.

Receiver's Ex. 15, Jan. 8/08, J. O. N.

July 1 '07. Monday
ENROUTE FOR HARWICH.

DEAR ALFRED:

Gillette tried Blackmer and was very cheeky at 2073
our first interview and he threatened all kinds of
things, lawsuits after being out of the firm, etc.
etc. unless I would let him have the £1000. I was
forced to be rather plain spoken with him at our
second interview (Wed. last). I also declined flat-
ly to give him the money; that brought him to
time, as I have hold you beforehand, and he agreed
to sign a hard and fast agreement, amplifying and
fortifying our partnership contract, to arbitrate
the D. & S. W. Coupons purchase A/c and the P.
Westm. & Lon. Syndicate matters. I drew up such
an agreement and he signed it the following day

2074 without a word of protest, then wrote a letter of protest, and signed it again, with another addition inserted by me, on Sat. morning.

I told Glyn's to-day to honor his drafts for £1000. He intends to draw it at once I believe and he is not to get any more until our disputes are settled in November. (I will send you copy of the agreement as soon as I have time to make one), excepting \$500 for Harold in July, and \$500 in August. Now mind, you stand by that.

I had another satisfactory interview with Barth to-day, shall go to meet him at Brussels by 15th inst.; we both hope that the N. Y. market will continue to improve.

In haste, ever yours,

RUDOLF.

Receiver's Ex. 16, Jan. 8/08, J. O. N.

FRANKFORT ON MAIN,
July 5th, '07, Friday.

DEAR ALFRED:

I have arranged with Andrae who was very nice about everything, that my mother-in-law shall pay up her debt to K. & Co. I shall wire you later
2076 in the day to that effect, *i. e.* to draw on D. & J. DeNeufaille, here, for the equivalent, assuming that you will ask them to pay the about M 175,000 to the fil. d. Dresd. Bk. this advice should reach here on the 15th inst.

I have not heard from the Anglo Foreign people yet in reply to my letter to them, which I sent them after last writing you. From McLean's copy of your answer to them, your and my replies tally, as we both state that 60 is no figure for C. C. C. Do not be in a hurry about putting up more collateral, but do not be rough with them. I hope that before very long C. C. C. will be more active and then

things may look different altogether. I have just 2077
 written a letter to Blackmer, which I ask him to
 show you; I wish you would see that Nestle and
 McLean read it as well, so as to have them posted.
 I expect to meet Barth in Brussels about 16th inst.
 He is just disposing of his London branch, on ap-
 parently favorable terms, to another (large) firm;
 he has given me some papers, intending to again
 reduce his capital and pay back part of the money
 put in, but I have not had time to work it out, and
 shall use it as a lever to keep him, or rather get
 him more and more busy on C. C. C. matters.

If, when young Richard Andreae returns from his
 travels in the U. S. to N. Y., you can get him a 2078
 place, as *volontair*, of course, with us or with any-
 body else, Albert Andreae would be pleased. R. A.
 is the son of one of A. A.'s partners, and they would
 like to keep him over there for a year, at least, if
 possible longer.

At Jean Andreae's request, I am cabling to Nes-
 tle to-day: "Request Alfred Kessler write Andreae
 father minute information about character, con-
 scientiousness Milne adding MacLeas opinion."
 He drew it up that way and asked me to let him
 know the expense after putting into code: but of
 course it does not work out in code any better. I
 had a long interview with Jean Andreae the day 2079
 after my arrival; he seemed favorably disposed
 towards Milne, but is strongly against his son going
 to New York at all, and will again try to dissuade
 him on his return from Italy in about two weeks,
 where the young man is traveling just now for
 Passavant & Co. Milne wants an answer before
 his return to the U. S., hence the hurry and the
 cable asking for your and MacLeas opinion, whom
 I mentioned as the man through whom Milne came
 to us. I trust you will write to father Jean
 Andreae in detail. As to financing,—if it comes
 to that—I hardly think, J. A. would allow his son

2080 to become a responsible partner at once: I suggested to him that, in order not to have any possible conflict of his and our interest, that the start should be made by his sharing in our loan to M. T. & Co.

I have done some work on Daimler matters and have also asked Howard Taylor to come over from Paris to look into matters for Morse. Great changes have taken place, but the situation has not become any simpler thereby.

Ever yours,
RUDOLF.

2081 **Receiver's Ex. 17, Jan. 8/08, J. O. N.**

SS Deutschland
via Cherbourg.

FRANKFORT-ON-MAIN,
July 11th, '07.
Thursday A. M.

DEAR ALFRED:

I have just wired you: "(D. & J. de) Neufaille (here) will pay (on) July 22nd to balance the account (E. von) Neufaille: You may draw to suit yourselves.—How much have you drawn (on) Schenck.—Have or liens (County Quarry Company) paid."

2082

There was some delay about this Neufaille matter about which I wrote you last Friday, 5th inst., but no doubt you will now dispose of the amount of my mother-in-law's indebtedness by this Saturday's steamer (13th inst) which would bring your advices into D. & J. de Neufaille's hands on the 22nd inst.—please have a note entered, that Mme. v. N. wants her securities sold to the extent of about \$43,500 as soon as this can be done without loss, and the proceeds are to be remitted to D. & J. deN. for her account; in other words, she

wants to have returned here the amount which she²⁰⁸³ is sending over now to pay her debt to K. & Co. If I succeed with C. C. C. a certain amount should come back soon; Tell Bertie to watch Oklahoma, M. V. & T. and other bonds belonging to Mme. V. N. Much will depend on the course of the New York general market.

My question about your drawings on Schenck is natural. I suppose that you have had Blackmer or Garlow draw the drafts or draft, inasmuch as the collateral on which they owe us (B. on joint account called "C. C. C. Lynd. K. & Co. agents" about \$200,000) has been refused and we have substituted other, acceptable collateral in place of²⁰⁸⁴ C. C. C. stocks.

I am very curious also to hear in reply to my cable questions, whether the Orleans County Quarry loan has been paid, or, if not yet, when it will be paid. Mr. Gillette told me, that he had written Seymour that he would underwrite \$25,000—with the understanding, that Seymour would within the 2 years relieve him of this underwriting.—I hope, that you have not allowed them to "string" you any more, but have insisted on payment. Mr. Gillette says, he would be sorry to lose the account and states they will take away the advances on "bills receivable" as well. I hope they²⁰⁸⁵ will bless them!

I asked Mr. Bernhard in my y'days letter to him (which I now suspect will reach there together with this one, and with my last letter to you, and letters to Mr. Blackmer), to advise me if \$6,200 have been paid for a/c "Olga Flinsch." I wish you had let me know regarding this, it having been understood, that the payment was to have been made the Monday after we sailed, *i. e.*, on June 11th.

I enclose copy of contract, or agreement, with Mr. Gillette, which I finished y'day and mailed to

2086 him last night.—Regarding Clause 7, I wrote to Mr. Gillette that I supposed you had paid to his son Harold, out of courtesy to J. and before my advices of our agreement had reached you “the \$500 for July, but that regarding the \$500 which he requested us to pay H. J. in August outside of the 5,000 put at Mr. J.’s disposal by the agreement, I must ask him to pay this or any other sum or payment out of the \$5,000, especially in view of his having drawn £250, without informing me thereof during our recent interviews. (McLean advised me of these £250 in his recent letter)—Now mind we must stand on that, because otherwise we shall
 2087 render our recent agreement null and void by deviating from its terms.

Regarding the Anglo-Foreign, I saw clearly, that they would not renew the advance on C. C. C. at maturity of present draft and therefore concluded it best to avoid their request for £5,000 additional collateral by stating that we would ask the borrowers to take up at maturity the part of the loan lodged with A. F.—Evidently this course has had the desired effect and before September 14th, I hope to be rid of a good part of C. C. C. stock, or arrange some other loan. If you have any suggestion please let me know and do not surround
 yourself with impenetrable silence.

2088 The rise in your market seems to be subsiding again which is a pity for all our purposes, I confess, I had little faith in its continuing in an upward movement.

I enclose a letter from my mother-in-law which she has just come here to sign. Please have the actual C. C. C. shares (or the approximate amount) of her syndicate participation of \$25,000 transferred to the _____ of Mess. D. & J. deN. and have all dividends and coupons remitted to them for her account.—Albert Andrae suggested that Mr. Reney also take up his \$10,000 C.

C. C. participation: I will advise you as soon as ²⁰⁸⁹ this is settled, also, what my brother can do. I expected to see him to-day at Cronberg, but the Doctor has looked me over and forbidden my going, so I won't see him till next week, as he goes to Hanover to play polo.

Kind regards to all.

Ever yours,

RUDOLF.

**Receiver's Exhibit 18, Jan. 8 08,
J. O. N.**

FRANKFORT ON MAIN.

July 18th, 1907, Thursday.

2090

Dear Alfred:

I am off in a couple of hours by the midnight train for Brussels. I wrote a letter to Schunck & Co. yesterday morning after receipt of your cable advice regarding their—behaviour in refusing acceptance to your draft.—By 2 p. m. a private letter from Edward S. reached me evidently pretending to have been written the previous day before your draft was presented to them for acceptance: He blandly says, that they think it better, not to re-open the drawing credit, as the collateral might ²⁰⁹¹ sooner or later not fill their requirements and lead to a renewed breaking off, that they had reopened the business on June 28th, I even drawing up with them the cable, which was sent to you and of which they kept a copy, he omits. My letter in reply demanded immediate return of the money, otherwise I would be compelled to state to our London and Manchester friend, Nugent, etc. the occurrence, which was the first time K. & Co. draft had been refused acceptance, as far as I know; this especially in view of Mr. Grahl's voluntary statement to me, that the draft would be accepted even though

2092 (I had introduced E. S. to Nugent lately, much to E. S.'s gratification) there was some misunderstanding at the start. I asked for telegraphic reply this afternoon, but none has come, probably because Grahl is absent, as usual, in the afternoons. I refrain from making comments, but I consider the occurrence very unfortunate for us.

What surprises me regarding these credits, which are being called, is the fact, that they were not called sooner. I have never found people as blue as at present. It does not surprise me: I have been looking forward to it for the last eighteen months. I advise you strongly to make some temporary
 2093 drawing arrangement with Manchester for £20,000. Do not forget that against the loss of blank credit we got \$200,000 C. C. C. deposit, \$100,000 advanced drawing for C. C. C. Synd. Acct. and that Daimler has paid back about \$310,000, out of fire and real estate: Of course the dwgs on Manchester were reduced, but with Milne and McLea increases new difficulties develop.

I think it impossible to get credits in new directions, in fact, I think it impossible just at present to get old ones renewed.

Try to get a bid for Daimler over there, in line with Bouggy's suggestion. Tell him to sell his cars
 2094 at any decent or indecent price in the meantime. The automobile market is glutted here. Difficult to get D. M. G. interested, unless through their own cars.

Ever yours,
 R. FLINSCH.

Will write more fully about Daimler matters after receipt of your promised letter and will then be able to give definite directions.

Receiver's Exhibit 19, Jan. 8/08, 2095
J. O. N.

BRUSSELLES, Friday, July 19, 07.

Dear Alfred:

I have just written to Mr. Blackmer in reply to his cable: "Your cablegram received; am not interest any joint account,—Blackmer"; which was re-telegraphed to me from Frankfort. Of course, his repeating his assertion does not change my opinion. I am very sorry indeed to have a difference with him. It will be of little use to cable about this matter any more. In fact, I am quite busy enough without this additional bother,—also received a 2096 wire via Fft. "Took up drafts under discount, cannot therefore repay money. Understanding was you should inform us of your New York partner's reply and that securities offered are subject to our approval. Moreover no advise from Trust Co. till two days after presentation of bills, so could not have accepted. Therefore no fault our side. Edward Schunck."

I cabled you: "Blackmer; think we can satisfactorily arrange; await arrival of mail (p) Russia (about which word I wrote in mine of 9th inst.) Hotel Bellevue (where I hope to get your answer). —Schunck's discounted your draft. Will you ar- 2097 range Orleans County (with) Manchester." Schunck has played a syn game, that appears already from the fact that he writes me a seemingly harmless letter after his refusal to accept the draft, without mentioning the occurrence. There was no understanding that I should inform him of my partner's reply. What for? And why should S.'s partner Grahl, with whom I made the arrangement, have voluntarily stated to me that even if there was some mistake about the first draft f. i. by reason of your misunderstanding my cable, they would surely accept it and adjust matters after-

2098 wards. And regarding their approving the securities, Mr. Grahl had stated definitely, that any securities would be satisfactory upon our statement that they could be sold within a few days, say a week or ten days.

All this explanation does not do us any good and I have abandoned the idea of going to London on Sunday and verbally demanding the return of the money, which I understood from your cable they had kept. It is a most unfortunate occurrence. Schunck has simply broken his agreement. As soon as I hear details from you, to whom draft was sent for discount, or to whom it was sold (the
2099 latter I doubt), I shall decide what to do. I hardly think that we can make a noise about it just now.

I also advised you in my cable to get Manchester to assist you at least until this wretched Orleans County matter is cleaned up. I do hope you keep after Seymour; I shall go to Paris on Monday night, and see if I can get Heine to accept on the basis of C. C. C., and to look up Dreyfus.

To-morrow, I am going to Antwerp to call on some of Barth's big customers with him.

He wants to renew for five and one half years his partnership agreements, paying us (K. & Co.) back about Fcs. 19,000, and being free from work in London, giving much of his time to C. C. C. He
2100 is anxious to keep our capital (thus reduced) with him and I am using this wish as a lever to make him work on C. C. C. If you agree to stay in (for the reduced amount) please cable me "Leopold," and if I see, he keeps busy on C. C. C. I shall give him a favorable answer. All his other "Kommanditaire" have accepted this plan. He, himself, is going to his parents in Geneva to-morrow night, where his wife and baby have been for a month, he expects to be back in ten days or two weeks, but his brother, a bright fellow, will stay here.

This letter must be taken to the P. O. now, to 2101
catch the Cherbourg boat.

Good luck, old man.

Ever yours,
RUDOLF.

It is a blessing to see the London boom in Yankees to-day. It ought to help in C. C. C.

**Receiver's Exhibit 20, Jan. 8 08,
J. O. N.**

FRANKFORT ON MAIN.

2102

TUE. July 23, '07

Via Cherbourg

German Steamer.

Dear Alfred:

After getting my mother-in-law to pay her debt to K. & Co., I have been pursuing Renny and my brother Edgar to pay up. You can imagine rather wry faces; it is a wretched job to have to dun people after getting them into a thing. They wanted to await results at Brussels before moving, but as nothing immediate could be accomplished, I told my brother y'day to pay up & expect to hear from him at the latest to-morrow. I shall, at the same time hear from him, if there is a chance of getting back a blank credit at the Dresd. Bk.; I have no great hopes; everything in that line is extremely difficult at present, although there is a change for the better noticeable in the opinion of people on things American. Of course, the U. P. bond fiasco caused a jar again.—Remy is away, but I am writing him to clean up before his military service begins next week for two months—I have to-day given to my father the two accounts received from you & asked him to arrange the matter. He was,

2103

2104 of course, rather displeased to have this call at the present time, but, if absolutely necessary will arrange to have F. & Co. take up the total due (\$53,190.80 plus \$16,083.94 = 69,274.74). against your sending over the actual C. C. C. shares for this \$68,000 C. C. C. Synd. participation, the N. B. bonds, Fkt. Am. shares, etc.—I am quite aware, that his taking this up & of course placing it with his banks to borrow on, will show rather plainly that K. & Co. need money badly; now, as we have already borrowed on C. C. C., the advantage may not be great enough, anyhow until such time as we are called upon to take up those C. C. C. dwgs.
 2105 which may be called by the drawees, like Anglo-
 Foreign. My father was quite ready to offer the collateral to the banks at once & also sell some of his Reichsanleihe (at 9% loss, of course), if I wanted him to. But, at my suggestion he will wait until I get a cable from you to act, using the word "Henri" to indicate your desire to be relieved of the advances at present. So please look over the situation and advise me, by cable (as above) or by letter.

I trust my brother and Remy will have paid up by then and I feel still too tired to do too many things at the same time.—I will see what I can do with Heine on C. C. C. collateral. I hope, he
 2106 don't be "en vacances" like most people. Of course, I knew that I would find this vacation difficulty at this season, but I do not see, how I could have left New York any sooner.

The enclosed copy of letter to Milne speaks for itself. He never let me know what he was doing and did not ask to call on me here; the first thing was his letter from Manchester, which I found on my return from Brussels. Of course, you know more about this business, but it seems to me, their stock should be sold *a'tout prix*. I still think, it was a mistake not to keep Milne in New York. But

that is not here nor there at the present time. I 2107
only hope, you will not let him place any more orders, and also that he will take a proper inventory, so that you, and also Andreae, may know, where Milne stands with his affairs.

About Daimler, I had a long interview again y'day with Katzenstein. He thinks that there is the chance for a great strike of business in combining all Mercedes interests in America and getting the parent people and the Societe Mercedes in with Daimler Mfg. and with Mercedes Import Co.; he also thinks that it would help Mercedes matters over here. If they go into D. Mfg. Co., they want it as clean as possible, as small a stock on hand, or 2108 machinery, or materials, as possible. I thought I would get Bouggy's letter to-day; I cannot do much before I have his views and the facts on which they are based, regarding possibility of sales. Katzenstein intimates that D. Mfg. Co. can practically dictate their own terms, if only they will get busy and sell this surplus of cars. For 1908, D. M. G. will build 300 cars less than in 1907.—Please read this to Bouggy to whom I shall write after next interview.

In haste, sincerely yours,

RUDOLF.

2109

Receiver's Exhibit 21, Jan. 8 08.

J. O. N.

FTT. ON M., July 26, /'07.

Via Cherbourg.

DEAR ALFRED:

I wired yesterday "Renee Edgar (Flinsch) will pay you soon, (I) will telegraph Monday. Prospects improving."

Calling in outstandings is a tough job at the present time: Everybody is procrastinating, but

2110 I hope to drive them in before long. This would be much easier, if C. C. C. were not so dead on the N. Y. Stock Exchange. Prospects are improving generally; your market has given a good lead lately, and if it keeps up and money conditions on both sides of the water continue fairly easy, my work here will be much easier. I am reluctant to go to Paris now to tackle Heine for a loan on C. C. C., partly because within a week or ten days the more confident feeling may have spread and I may succeed, where now I may fail, partly because the holiday season may then interfere less with putting things through, and partly

2111 My letter of 23rd inst. will probably reach you together with this one, as I found out afterwards, that the "Kais. Willh. could not sail that day.

Orleans County. I can hardly wait to hear, what has been done at and after the meeting which Seymour had called for the 18th inst. I sincerely hope that this advance has been, or will be cleaned up shortly.

I think Mrs. Draper had better sell her U. S. Steel Pref. at present prices; she won't do much better and she had better lighten her load.

I leant through my brother, that the marching order with the Dresd. Bk. are not to open or re-open credits in the U. S. at the present time, and
2112 I have therefore abandoned the idea of trying anything in that direction. Through the same channel, and his wife's cousin v. Steiger of the Dresd. Bk. here) I had already learnt, that they had called all credits in U. S., finding that they were being used chiefly for long drawings and only got an ever decreasing turnover from the various parties. I think, they have brought about these results themselves to a large extent, by their policy.

Enclosed letter to Bouggy speaks for itself.

Kind regards to all,

Ever yours,

R. FLINSCH.

Receiver's Exhibit 22, Jan. 8/08, 2113
J. O. N.

Fft. on M., Aug. 1/07,
 Thursday.

Via Cherbourg.

(If I am fit enough, I hope to meet Willy next week in Paris.)

DEAR ALFRED:

I just wired you that my brother Edgar will pay M. 40,000 (M. 25,000, plus M. 15,000) on August 12th, i. e. Monday week. This is a margin in excess of 25 per cent. on his \$36-\$37,000 debt on C. C. C. 2114 Synd. participations of \$22,000 plus \$15,000 (The latter being acknowledged and assumed by him on v. Frisch—'s account). I hope that he soon will complete his arrangements with the Dresd. Bk., here in Frankfort, to carry the balance due against delivery to the Dresd. Bk. of the share certificates, which I figure out as 271.95 pref. shares and 253.45 Com. shares. I told my brother, in round amounts 270 pf. and 250 Com. could be forwarded. Please have these figures verified and if should be wrong you must cable me after receipt of my cable to draw (probably at long sight on Dresd. Bk. Fft. on Main). Reney has so far eluded me with his mili- 2115 tary service (here at Fft.), but I hope to get at least a margin from him, and after we have that, it is easier to convince a debtor.

According to your cable in Re Barth, I have notified him, that you were ready to leave Frs. 25,000 in as , and asked him to write you what sum he has put at your disposal in consequence (allowing 5% p. a. int. on such deposit). Of course you had better draw it out at once. Barth has returned sooner from Geneva than anticipated. I expect to hear from him to-day or to-morrow.

2116 Please tell Mr. Blackmer, that I received his two letters of July 19th, and that I shall write him as soon as I am a little further along, as I am so glad he wrote so fully, as every little detail helps and renders things clearer, and that is important, especially at such a distance. Please ask Mr. B. to write me about progress in Beaver Land matters.

I had two long interviews yesterday and to-day with Charles Kessler, who had an impossible oil well proposition in Wyoming; I urged and begged him, to keep out of it, and work on less hazy things. Willy has written me to advise with him. As I have been unable to go to Paris or Zurich to arrange
 2117 with Heine or credit house I asked Willy, if he could put £20,000 at your disposal on C. C. C., or Orleans, or Milne etc. paper, and to cable you. I advise you to call in as many of your outstandings as possible, small f. i. Fuller, Baker, etc. Mrs. Draper; there is no sense in carrying f. i. Fuller's account, better throw him out altogether; reduce the others; you and they will be glad of it later. Keep an eye on Alliance Realty Shares: Sell them, even at 120, as for that matter at less, down to 116 and int. See if you cannot get rid of Mr. Gillette's Devlin bank stock. I would not bother much about formalities regarding that bank stock: You might
 2118 sell it at auction, these bank people out west buying it. Can you not sell Mr. G. other stocks and clean up balance of D. & S. W. Corp. branch account? Has Douglas paid? If not sell him out. Act whilst money stills seems easy. Doctor says my cough is nearly cured and now he will get me generally into better condition.

Ever Y

RUDOLF.

Receiver's Exhibit 23, Jan. 8/08, 2119
J. O. N.

FFT. ON M. Aug. 2/07. Friday.

DEAR ALFRED:

Got your cable this morning "Henry, stocks will be forwarded next week which is rather sudden, as I must first see my father and his bank, to arrange about the matter, having refrained from doing anything pending arrival of your cable. I shall probably wire you something to-morrow Saturday. It is a pity, there are no transactions in C. C. C., or at least more frequent quotations. I am up against that at every step. Had quite a talk with ²¹²⁰ Reney again last night, trust I will get at least something as margin.

Just got your letter of July 23d, thanks. I trust you have not paid Harold Gillette \$500 on August 1st, the explanation to him is, that we have arranged with his father, that his father will look after him, to avoid his drawing checks on you and then refusing payment, you had better drop him a private note, telling him of the arrangement, this, of course, only in case the matter has not been settled definitely before arrival of this letter.

Please have the 2 enclosures forwarded. Please thank Nestle and Bernhard for their letters, where- ²¹²¹ in everything is O. K. I am feeling better today, not so much fatigued, as I have felt since that wearing week in London. Trust will be fit again soon.

Ever yours,

RUDOLF.

2122

**Receiver's Exhibit 24, Jan. 8, 08,
J. O. N.**

FRANKFORT ON MAIN

Aug. 8/'07.

PRIVATE.

DEAR ALFRED:

My father tells me that there would be no use in trying to arrange a loan on C C C here in Fft. Of course, there is no legal obligation on his part for these various advances, but he is willing to help us all he can, and tells me that he will put M 70,000, possibly up to M 100,000 at our disposal, as soon as my brother Bernhard returns, whom I have been expecting daily since Sunday, and who is a partner in F. & Co. I must confess, that the cable giving C C C at 65 bid, 70 offered (though only 100 shares) was unexpected, because I was telling everybody the asked price was 75. I cabled you yesterday that Reney would pay M 10,000 on the 16th inst., which enabled you to draw on him yesterday. You will have received Barth's advices, putting 80,000 at your disposal. All these dribblets will help ultimately aggregate a fair amount. I am corresponding with Barth *in re* C C C; yesterday's slump in New York may interfere with this business but I hope not. As soon as I feel that my presence may be useful in Brussels, I shall of course go there, although I feel still pretty weak and tired, although much improved by my cure, which, however, I have to break a good deal. I wired you also that Willy had already written you, putting £20,000 at your disposal. I thought those Dreyfus drafts might be difficult to renew and wrote him about the accommodation. I hope you have sold stocks during the recent boom and were not caught yesterday. G's health, for which you inquire in letter of July 30th just received, has, in my opinion, not im-

2123

2124

proved. I am surprised to hear from you of his ²¹²⁵ early sailing. Do not let him bully you. If you want to arbitrate at once the differences as per our recent agreement, then get Mr. Blackmer to be our representative; he knows all about the D. & S. W. business and will quickly grasp the P. W. & S. matter; he would save you doing a lot of work, and would also handle Mr. G's representative well, also the Referee, should he and Mr. G's man have to resort to a Referee. You understand, of course Choate would appear only as nominator of a referee, if B. & Mr. G's man fail to agree on a referee, and that in only a remote chance. In consequence of what you say about Heine's probable ²¹²⁶ unwillingness to loan on C C C I may not try him; B—Swiss Franc. will hardly start a new drawing credit in these times. I shall try and concentrate my energies on selling C C C. Why has C C C such a small bank balance? Are they running behind? I have told people over here that C C C keep about \$200M in N. Y. besides their working balances in Colorado. Please get Mr. B. to write me about this shrinkage, which seems to occur just when I am busy selling C C C stocks. Tell Nestle the only practical way to sell Daimler contracts is by selling the stocks, probably more than the contract control; the assets have become so ²¹²⁷ much simplified (like Mtge. Bagonne, R. G. Steinway, Machinery, building, stores) that their value can easily be determined, if necessary by independent appraisers, and can be added to the price to be paid for the patents, contracts, etc. That latter price being one fixed the rest is easy, of course, a bare control would probably sell for proportionately more than the whole stock would. Please have Nestle hand the enclosed bill of sale to Mr. Matheson, to whom I am writing direct, assuming that he is attending to the matter, only I thought, he might be on his holiday and there-

2128 fore did not direct the bill of sale to him direct, in view of the hurry of the purchasers. Good luck to you. I hope you and Ada are both all right again.

Ever yours,

RUDOLF.

I am much better.

**Receiver's Exhibit 25, Jan. 8/08,
J. O. N.**

FRANKFORT ON MAIN.

2129

Aug. 9/07.

Via Cherbourg.

DEAR ALFRED:

I confirm my yesterday's lines Via Cherbourg and the Hamburg boat. I have just finished a long letter to Barth who has asked for a definite proposal or offer; I have made him one; it is too early to write in detail about it to you or to Mr. Blackmer, as it may have to be changed. The panicky break in New York on Wednesday has made it necessary to come down in price a good deal, or rather to content with a very small, if
2130 any part of the commission. It may be necessary to send over some C C C shares putting them at Barth's disposal for immediate use in case of his needing them at once for delivery; a sort of consignment business; it may be possible to send them to Banguet de Brussels, I suppose, without letting them go out of our hands, they to hold them as our agents until paid for by Barth; you have some shares free, belonging to the Syndicate and for account of this syndicate they could be held by B. d. B as our agents just as well as by ourselves and deliveries be made, the proceeds going to the credit of the C C C synd. with us. Better ask Mr.

Magie about this and if I cable "Brusselles" answer "Yes" or "No." I presume you would not distribute anything to the Synd. members until at least 15 or 20% of the Synd. holdings, *i. e.*, \$300,000 or \$400,000, are disposed of and on deposit with us. Also bear in mind, that you may be called upon, on behalf and for the benefit of the syndicate, to buy up shares at any time, so you ought to keep at least \$100,000 in hand all the time, after, of course, liquidating that \$100,000 advance which belonged to the Syndicate. And which we financed for the syndicate some time last Autumn, when they asked us to be ready on demand to buy up to \$100,000 of stock in case of need. I do not think you ever paid that back? 2131

Regarding "Brusseles" let me add, that I will have to cable the name into which these shares on consignment would have to be put, also the number of shares to be put into single certificates, perhaps less than 100 shares for each certificate.

Regarding drawings on Manchester, I should advise you to cut out their acceptances for our account on Crooks' behalf; that will bring their line of acceptances down. I do not think we ought to finance Crooks, if we need our facilities for ourselves, and to far better advantage and for more pay than Crooks' small commission. Times change: if the largest banks have in their lines, we ought to follow in their lead and cut down too. Of course, that may not please our customers but do the banks care how it pleases us to have facilities taken away? The same applies to MacLea and Milne, in fact to all our debtors. Don't let them talk you deaf, dumb and blind, but stick to your point and force them to reduce their debt to you; you cannot afford to consider their feelings; you must only consider your own interest. I have today telegraphed my brother Bernhard to return, in order to get him to pay in that M70-100M men- 2133

2134 tioned yesterday. Of course this will be done without any loan on C C C stock. Am convinced now, that if I try to get F. & Co. to borrow on C C C as at first contemplated, it will be all over Fft. in no time that K. & Co. in N. Y. are hard pressed, because the banks here have nothing to do but gossip, and they will put 2 & 2 together very quickly, when they have C C C offered as collateral. Am now writing to Willy.

Au revoir

Ever yours

RUDOLF.

2135

**Receiver's Exhibit 26, Jan. 8/08,
J. O. N.**

FFT-ON-M. Aug. 15/07.

Via Cherbourg.

DEAR ALFRED:

I shall write to Nestle by this mail, so as not to put too much upon you. I wrote to Mr. Blackmer by last mail, asking him to communicate contents to you. The N. Y. Market recovered on that day, but had a slump again yesterday owing to Pope Mfg.'s failure. So the reports in the Fft. Ztg. have
2136 it. I suppose other automobile concerns will follow. Regarding C C C I shall, during the next 2-3 weeks concentrate my efforts on a sale, and then, if necessary and in view of the Anglo Foreign maturity on Sept 12th in London attempt to secure a loan. As things with Barth stand now, my chances for a sale are about as good as for a loan in others, yet untried quarters; but much depends on the course of the N. Y. market during the next few days. I have heard the opinion here that N. Yers. seem to be losing their heads; but against that may be said, that it is equally difficult to get money here, even at usurious rates. If Barth sells C C C,

it will be better than raising a loan; of course, as 2137
 recently indicated, you will not at once make a
 distribution, but keep the money on deposit. Can-
 not you get Mr. Blackmer in an inoffensive way
 to increase the C C C deposit again to the usual
 \$200,000—250M. I suppose, he is keeping the
 money out west; at least, I hope he has the money
 somewhere. Do not say, that I suggested this to
 you, but you had better raise the interest rates in
 conformity with prevailing rates, in case he refers
 to the interest rates; with all the unpaid work by
 me as the road's V. P., are helping out with the
 Beaven Land viz, etc., we ought to get some benefit
 out of this Co. which we had to nurse through rather 2138
 troublesome times; now with high money rates, their
 deposits should not be reduced, i. e. just at a time,
 when it would be useless to us. These are only a
 few suggestions to you, when talking to Mr. Black-
 mer I hope that the renewal of the Dreyfus bills is
 not too difficult.

The Park Bank matter you managed well; villa
 Ouff——! I hope, that in line with my C C C
 efforts here and in line with my repeated advices
 during the last two years, you have sold stocks dur-
 ing the July boom: And that you have also acted
 on my various recent suggestions to get customers
 to sell stocks, or goods, etc., and reduce their in- 2139
 debtedness. Bertie never sent me those purchases
 and sales reports, for which I asked him before
 sailing to be sent once a week, and I am therefore
 unable to judge, what was done in that direction.
 I trust to be able to cable you to-day or to-morrow
 regarding my father's steps: My brother Bernhard
 returned Monday night, but had to hustle off again
 and I have made no progress so far. Regarding
 Mr. Gillette, I do not remember, if I wrote you,
 that in my first, very disagreeable interview with
 him in London, the statement escaped him, that
 at the time in March 1902, when he forced that

- 2140 \$800,000 agreement upon us, he gave \$800,000 of his property to Mrs. G's trustees. Of course I promptly answered that this trust would not hold a minute in a legal action, he being responsible for the firms debts at that time and therefore, as a debtor, not permitted to trustee away his property. The next day he said, he had not made that statement: I suppose he was sorry he had made it. This only for your information. See if you cannot get him busy doing something to relieve us of P. W. & S. burden. Also get him to give you some of his securities which he had in his vault at the Han. Nl. Bk., I believe. I hope you have taken the
- 2141 Milne matter up vigorously upon M's return: Young Andreae should return any day now; but do not wait for him. I trust you got Bouggy to act on my instruction in my letter to you of July 18th, to "Sell cars at any decent, or even indecent price" and that he completed this before going on his vacation with Pope down, he will be glad of it now. Kind regards, I am better, but not much good yet. They want me to go off for a rest, but I cannot do it.

Ever yours,
RUDOLF.

- 2142 **(There is no Receiver's Exhibit 27.)**

**Receiver's Exhibit 28, Jan. 8/08,
J. O. N.**

FFT.-ON-M. Aug. 20/'07.

DEAR ALFRED:

Thanks for your two notes of 6th and 9th inst. I had heard some of the rumors of which Willy writes you, but somewhat differently. Mrs. v Lang (Reney's mother), who has the worst tongue in

Fft., had got hold of something and exaggerated²¹⁴³ it: Something about our having lost \$300 M, perhaps some rumor about the Barthmann-Kessler-D. & S. W. trouble: Her taking hold of it, was lucky for us, because everybody considered it a lie in consequence, even her son, I believe. That was six weeks ago and it must have blown over. Reney, after some trouble, paid as you may have noticed, i. e. his mother let him. Of course, she also must have heard of my forcing my mother-in-law to pay up (you know, I suppose, that R married Olga's sister). I have not the courage to make still more of a stir by bothering my brother Edgar still more to pay up the balance of his debt; he²¹⁴⁴ could only do so by borrowing at the bank. I expect to hear from him, what information the Dresd. Bk gets about C C C on his behalf and if favorable, and feasible, I shall proceed. The same with my father. I wrote you already, that I did not like to have him take the matter to his bank: These rumors, which he had also heard, were the reasons. Regarding the M 70-106 M, my other brother returned last week, and after consulting with my father, told me that he had no objection to putting this plan through, in fact, if he personally had money coming in, would also put it at our disposal, to assist up. But their funds do not²¹⁴⁵ come in until the second half of September, when the contracts are liquidated by previous sales. I was sorry, the funds were not available immediately, but such is the case.

Please tell McLean, I have written to Banque de Commerce, asking for C C C advance, hope to hear to-morrow. Shall then try to do something in Paris, as I am really much better now, although the doctor wants me to take a week for the trip and take Olga along. Of course, I shall not, but hope to get off to-morrow night (Wed.) and be back Friday morning.

2146 Tell Bouggy, I was very glad to get his letter and shall follow it up and will write him soon: Also, that Morse (i. e. Mercedes Import. Co.) have not contracted for next year, so Taylor writes me from N. Y.; you could have found this out from him there; tell Bouggy to write me fully, as promised, after knowing this.

Have not heard from Mr. Barth again, no wonder, with the N. Y. market in that condition. I shall try in Paris, to place some commercial paper too McLea, Milne, etc.

2147 Glad to hear about some progress in Orleans Quarry but hope Seymour will not now try to string the thing along until decision by the judge on October 3rd. Cannot he take up part at least of the loan, with that underwriting for \$132,000? balance later? Let him do that, so as to avoid his fiddling along indefinitely. Why do you not sent notice to C C C borrowers, raising advance to 8% int. p. a. I mean a carefully worded circular letter, pointing out general money market conditions. You will find, some will pay up: f. i. Reney, and perhaps my brother too, when he finds our loan, even the 25% margin so expensive.

Ever Y

RUDOLF.

2148

**Receiver's Exhibit 29, Jan. 8 08,
J. O. N.**

FFT. ON MAIN, Tue. Aug. 27/07.

Via Cherbourg.

DEAR ALFRED:

I went to Paris night before last and returned this morning. You will have received my cable from there: "We have arranged Dreyfus will not accept (American drafts) with the exception of K. & Co. Saw Heine and Co. too late (Regarding

your cable proposition to them to discount F S 2149
750,000 90 d/s on Dreyfus); (this) can be done,
await arrival of mail—Cripple cannot be done here
(i. e. in Paris). Frankfort to-morrow: Zurich
Thursday."

All this, of course, refers more or less to your
Saturday's cable urging a cash loan arrangement
on C C C: Having arranged to go to Paris and
thinking I would have a better chance there with
Heine or Marcuard, I went there first. I saw Mr.
Meyer-Bard at Marcuard's (he is Mr. Krauss's
nephew), the other partners being en vacances.
We talked general conditions first, when he said
that they had no end of propositions to give their 2150
acceptance to New York on Stock Exchange col-
lateral, 20% margin, broad market of collateral,
etc., but that the general feeling in Paris was
against America, which had abused its credits,
that Hirsch & Dreyfus had been the chief culprits
in giving their acceptance too freely and for enor-
mous amounts: That he knew Dreyfus personally
and discounted their acceptance say fs. 50,000
without previous inquiries from the sender, but sev-
eral fsc. 100,000's or a million, he would want to
be asked first, as he naturally had a certain limit
for their acceptance and he might be nearly full
of it that D. R. were a rich firm, but not very "Sym- 2151
pathique," thinking that they could do everything
and evidently not considering what other people
said or felt about it; that Dr's son the "depute"
had, about six months ago in the chamber des dep-
ute's, criticised the action of one of the Ry's Co's,
either the Orleans or the Midi in discounting large
amounts (I believe F S. 5 mill (of paper of the
large sugar concern, which had then failed, and
had stated that the "consul d'administration" of
that railway should be centured for using such bad
judgment; that in consequence the Ry's got down
on Dreyfus and reduced or cut out altogether Drey-

2152 fus acceptances when discounting bills, which business they do to a large extent, being under a sort of government superintendence and in that line of business to employ their large cash reserve. (See Dreyfus' version below). In short Bard thought Dreyfus was acting like a Jew, who had been successful and become rich.

Mr. Borel further said that he hoped K & Co. would see their to increase the turnover on his books, because at present it was practically only the drawing covering and redrawing of that Frs. 100,000. I told him, that I would see what we could do, as to joint account, he said he had one
 2153 with Schulz and Reickgaber and would not have a second one in correspondence. Regarding bills on Dreyfus which he, as indicated above, would discount in such regular business, he expects bills drawn by third parties and endorsed by us, and it seems to me that you might work in now and then some drafts drawn by Ruggy or Garlow, or possibly with some other person or firm by special arrangement (like the Lazard-Iselin drafts), although, as stated below, Dreyfus prefers draft drawn by ourselves; you might in the event briefly state to Dreyfus, that you had arranged it that way, having secured a favorable discount rate, etc.
 2154 If you mix bills a little, you might work off some of these Dreyfus drawings with Marcuard. If you go above Frs. 50,000 you had better cable him asking for the rate of discount, but itemizing the drawee's names.

Notwithstanding Borel's previous statement I took the trouble to ascertain more clearly, that no C C C loan business would interest him at the present; I did not mention the name of C C C at all, they simply are not open for any acceptance business from New York.

Heine was not in, when I called on him then, so I called on Dreyfus, where the partners being

"en vacances," I saw Mr. Simonet, (for 30 years²¹⁵⁵ with Samuel). I complained about their doing business with G. S. & Co. who were not careful about the rate at which they sold their drafts on Dreyfus, and that that hurt Dreyfus' name, and made business harder for us; he had notice on several times not having renewed drawings at once, understanding that we had waited until full rates were paid us, which they much appreciated (and which action, more than anything else, evidently made them see their error in having others draw on them from N. Y.) Regarding Bache, he called them clients of ours, and said Bache had personally asked for this last business; it was fortunate,²¹⁵⁶ that the deposit of collateral with us, instead of the Park Bk. had brought the thing out, and it was equally fortunate, that you had no commented upon the matter when writing to them about the deposits of securities by Bache. They felt rather sheepish in consequence, upon my request Mr. Simonet said they would decline to renew Bache's drawings, to enable us to state positively (to brokers, for instance who might hint at drafts drawn on Dreyfus at lower rates than ours), that nobody else had drafts on Dreyfus for sale in the N. Y. market excepting a few small and scattered drawings aggregating not over Fsc. 250,000.—by²¹⁵⁷ G. S. & Co. (which by and by they will also do away with). S. understood, that this was to Dreyfus' interest as well as to our own.

I shall write to Simonet a personal letter, confirming this understanding, and the fact, that I had reported it to you, as arranged with him.

I asked him also about the "deput" affair; evidently, they are more than sorry about the occurrence, which I told them had been reported to us; He took this as a sign, that others were anxious to queer him with us, and explained (the same as, wherever possible, they had given it out in other

2158 directions), that young Dreyfus had made no speech at all, but, before going to get married (in Italy) had given his "jeton" (ticket or medal) to a friend to use during his absence for voting purposes, and that this friend, carelessly had cast the vote against the railways. Of course, that sounds pretty thin: It shows how sorry they are, and that they have learnt a lesson and are anxious to rehabilitate themselves. I hope they will succeed and quickly.

Simonet said, they liked such advances like Mercedes, etc., and that they would be pleased to do more in those directions, whenever we saw fit.

2159 (This cannot be done now, I assume, owing to the difficulty in selling drafts on them: but it is well to know their sentiment towards us). He was sorry that our business was smaller in volume (on the —), but thought that with a change of general conditions it would improve. I asked him, how it would suit them, to have merchants, etc., draw on them, we endorsing such bills, etc.: He prefers our own drawings, "Banker's drafts" as showing something besides collateral. Notwithstanding, I think, they will not object to Garlow's etc. drawing, (like the Bache arrangement last year), especially, if plausibly presented.

2160 At 2 P. M., I met Heine: Of course, regarding the general situation, I gave him my yarn about Roosevelt's utterances recently and that they showed, that R was aware, that investors might innocently suffer by a demagogique persecution of R. R's & Trusts, but that now, the Govt. being apparently in a more sensible, calmer mood, probably by experience, the danger was solely in the tightness of money and difficulty of obtaining it. He denounced the overreaching on the part of Americans regarding use of credit and borrowing in France, said that the present sentiment in Paris was perhaps going too far the other way, and that

everybody was down on America; that the placing²¹⁶¹ of Penn. and also to a certain extent of N. Y. N. H. & H. notes had been a disappointment and a loss to Paris, that French people could not follow such enormous transactions: That they could not understand drops in shares of 35% in value and especially of bonds of 12-15%. He seemed interested in my speaking of "special" transactions, perhaps on J/G, of loans on collaterals with margin at 7 1/2-8% int. p. a. or at one percent com. for three months' drawings, but, notwithstanding, just at this moment, he could not make up his mind, and I naturally refrained from saying anything about C C C. He said, however, that the moment things²¹⁶² looked a little better, he would like to hear more about it, which shows more enterprise than Marcuard. (I did not understand why Dreyfus should have written you about difficulties in discounting Heine's bills; what must he think of placing his own?) Heine showed me your cable and seemed sorry, he had already answered it that morning. I thought it was well drawn up. Heine suggested that you try again, said that a cable was not expensive, but the anti-American feeling in Paris much change a bit first. I suggest, that you do not offer him such a big lot of one bill; mix them up a little; put in with others say 150-200 M of Drey-²¹⁶³fus, and let more follow 10-12 days afterward with another lot. If you do it that way, Heine will not wait until all clouds have been removed from the money market, before accepting your offer, but will be satisfied, if only a little steadiness has returned to your market, f. i. if the improvement of yesterday continues or at least, does not go all to pieces again. Heine understands now, that collateral is back of the Dreyfus drafts, but when you cable him again, better state again that collateral is on deposit, with trust co. I told him also of Dreyfus decision to limit his acceptances for N. Y. to dfts

2164 from K. & Co.; he seemed pleased, and so was Borel (of Mercedes) on whom I called again, to tell him; he said "vous leur avez rendu grand service."

If we cannot accomplish much, we must be satisfied with little, and keep plodding along, however tough it may be. I shall go to Zurich to-morrow. I sincerely hope, that you will get rid of the large batch of Dreyfus drafts, which you seem to have on hand. Of course, I shall do my best with Schnveiz Kredit Anstalt: You can count on my doing my level best all along. Barth writes that he will write me in a few days about C C C. I am almost surprised he still bothers his head about it. Qui
2165 vivra verra. Tell Bouggy, that as soon as I find a moment's time, I shall write him about a plan to raise money for D. Mfg. Co. in America; he wants me to consider it, before advancing the idea of rebuilding; I am quite of his opinion that it is well worth trying. I have not yet received a definite answer from the parent co, but, considering money conditions here, I understand there stringing the matter. Tell all this to Bouggy. I am better: Not quite so fatigued from the Paris trip as expected. Good luck to you old man,

Ever yours,

RUDOLF.

2166

**Receiver's Exhibit 30, Jan. 8/08,
J. O. N.**

ZURICH, BAUR AU LAC,
FRIDAY, Aug. 30/'07. 4:30 P. M.

Via Cherbourg.

DEAR ALFRED:

I wired you an hour ago "We have arranged (with) Banklen (Len & Co) joint account (at) 8 percent p. a. interest \$100,000 six months loan against 900 C C C shares pfd. stock and 900 com-

mon stock. Draw at 90% payable Paris (at) Ban- 2167
que Suisse and Francaise. We have arranged also
about direct discount (of) commercial paper and
our drafts at (long) sight (on) London and Paris.
Writing."

I arrived here yesterday morning and called on
Schweiz Kreditanstalt and saw Direktor Escher,
told him that we were sorry about our inability to
continue with them, business having to follow the
facilities offered. He said that they had to cut out
their bank credits, being much in demand for ac-
ceptances, and moreover, that the Ban que Nation-
ale (The Swiss Bank of England), declined to dis-
count straight finance bills (but how can Len & 2168
Co. accept now, I ask); he insisted, that the D.
& S. W. loss was not the cause of the calling of
the credit and said that the loss was written off.
I told them about the reason for the failure of
that unfortunate business. I told him of our desire
to do some "special" business, loans on collateral,
mentioning 8 percent p. a.; he seemed to like it,
but said, they had no money to loan, being not
at all clear about the prospects for this autumn,
when there might come a squeeze again, although
people had prepared so much, that there might not
be one after all. Whilst he seemed undecided yet,
I dangled the 8% before him, but he simply could 2169
not make up his mind to take the plunge. There
was no need to go on with him and mention C C C.

At Aktienges, Len & Co. I called on Direcktor
Hirzel, a fairly young man; we found out, that
we had the same uncle, Burgermeister Varren-
trapp at Eft. and got on very well. He sent for
vize-direktor Brupbacher (28 years old) three
years in N. Y., the last year with William Solomon
& Co., as confidential clerk. He is in charge of
the investment department, especially of their
"Bureau fur N Ordamerik Anlagewerte. I ar-
ranged with them, that they will cable you (their

- 2170 suggestion) by Hartfield's Code (as a rule) offers for such bills. I told them we drew long on Rufflers & Lloyds Bank. Their intending to cable you is not to preclude, however, your cabling them making offers. G. S. & Co. discounted with them in that way last year a good deal. The notes are sent over here, and he keeps them to have \$ on hand, buying them, when he thinks exchange will move in his favor, and when he has money. He will cable you "Offer of commercial paper with your endorsement, exchange at our risk," and will take all or any part of \$100,000, and would like amounts down to \$5,000, as he can re-discount them
- 2171 here with small investors. You are to offer them also, asking "At what rate will you take \$ — commercial bills." I told him, we had never discounted V. & A's paper, and never discounted blank notes, always had merchandise, or goods sold in advance, or accounts receivable back of the paper. He does not care to bother about such collateral, as long as we endorse the notes. I told him we did not consider the name and capital of the borrower as the main security, but chiefly the fact that legitimate and revolving business was the basis of the advance, etc. When you send him notes (I mentioned the names of MacLea, Milne,
- 2172 Orleans, quite *en passant*), mix them up a bit, also, I think it inadvisable to send suitable reports from the agencies along. He is quite keen about doing business with us in that time: It will depend on his having sufficient money and on exchange rates: He got sick of G. S. & Co., and will not take again such amounts. I also arranged with him, to be done at once, if you chose (*i. e.* to-day) for the equivalent of \$100,000 to be drawn at 90 days on Len, payable Paris, against C C C stock, which you will put into the dossier of this—with you; one renewal of course. With the present exchange rates, this should net the — pretty well

at maturity. He would not bind himself for 2173
longer: That may be arranged later.

I told him this was part of a loan of about \$500,-
000, of which Ruffer had taken £30,000, and Paris
about \$200,000. I also told him briefly about C C
C, no bonds, no debts, bank balances, dividends
etc., limited market, etc., former prices, present
prices. I figure that with the collateral at 67
there is a margin of about 20%.

If any more occurs to me, I shall write by next
mail: This letter must leave at once. I saw both
the S—'s: Will write. Saw Fasy (Alfred), who
is now with National Bank, and I am going to
him again now. In haste, sincerely yours, 2174

RUDOLF.

(Leaving for Basil to-morrow morning, and hope
to get to Baden Baden next week for some rest,
alone with Olga, feeling a bit tuckered out.)

**Receiver's Exhibit 31, Jan. 8, 08,
J. O. N.**

FFT. ON M. Sept. 3/'07. Tue

DEAR ALFRED:

2175

Please also send to me some sample shares (in
blank, and cancelled) of C C C, one of each kind,
I should say: he asks for that to show to his cus-
tomers: Perhaps, in place of the 250 shares he men-
tioned recently. Please have the monthly C C C
statements sent to me: The last I have (I mean
the large sheet, in detail) is for the 10 months end-
ing April 30th. Why did Garlow not send the
other right along?

I shall write about the Lyz's, Faesy, Pestalozzi,
and about the various people in Basil, by next
steamer, when I hope to have the Basler Handels

2176 bank's answer, if they accept long drafts based on commercial paper: The question goes before their board this week. At the Bank verein they seemed to feel the least nervous about the money situation, less than at any other place, I have been to yet. All details later. I have my hands full.

Regarding drawings on Manchester, I think it a mistake to wait so long with that. "A stitch in time, saves nine." However, you are on the spot and better able to judge. I hope you succeeded in working off Dreyfus. I shall write to Mr. Simonet at Dreyfus to-morrow. Have not had the time yet. I hope to get off on Saturday, with
2177 Olga, for a 2/3 weeks rest at Baden-Baden, leaving the children at my mother-in-laws, where we moved to (53 Schanmanikani) to-morrow, my parents having to go to Freudenstadt by Friday. B. B. is not so far off and I can handle Barth from there, as well as from here.

Ever yours,

RUDOLF.

**Receiver's Exhibit 32, Jan. 8/08,
J. O. N.**

2178

FFT/M Sept. 5th, 1907. Thursday.

DEAR ALFRED:

Shortly after making my Tue. letter to you, I received your cable "W. V. G. refuses arbitration: demands satisfactory arrangement Friday: Should advise you to return."

I am awfully sorry for you, my poor Alfred, to have this damned Skunk on your hands: I remember too well, how his impudent, threatening manner upset me in London at first, in fact, a good part of my having been seedy lately dates from those interviews. The only way to handle

the skunk is firmness, and, at times, roughness,²¹⁷⁹
 not to let him talk and ramble on, but to raise
 one's voice above his, and talk him down, not be-
 ing any too particular about the choice of words:
 "Auf einen graben Klatz gehart ein graber Keil."
 You will then find "that his bark is worse than his
 bite." He is a vicious beast nevertheless. But dont
 let him bluff you. Don't let him order you around,
 —order him around: Don't allow him to think that
 his affairs are of the first importance: Do not
 treat him like you equal, but like a lackay: The
 way he will, or will try, to treat you. If he talks
 of "Pulling out of this firm; laugh at him and tell
 him not to talk any such rot, after having got us²¹⁸⁰
 stuffed with all that stuff: Orleans County, P.
 W. & S, etc., and that until we are rid of those
 we would not allow him to "pull out," but, on the
 contrary want him to help carry, and must insist
 on it.

I had hoped, and arranged, to be on hand when
 he returned to N. Y.: First he said he would be
 back in Oct and we fixed the dates for arbitration,
 etc., for Oct. and Nov. accordingly: I insisted that
 the verdict should be rendered not later than Nov.
 and told him that I would not allow anything
 about which we are having disputed now to be
 left for arbitration after his having pulled out of²¹⁸¹
 the firm I know, for certain he would then break
 his agreement to arbitrate: Apparently he is ready
 to do it even now, whilst still a partner. After
 we had thus fixed the arbitration for October and
 signed the agreement (each sheet separately, by
 the way): He told me he would go in Sept. al-
 ready, and then that skunk sneaks off to N. Y.
 without letting me know a word, in order to make
 things hot for you, who, I should think, have your
 hands full enough without him pestering you.

And then to demand a satisfactory arrangement

2182 by "Friday"! It is a regular hold-up. Why this sudden hurry?

I know well, how he does it: Staggers into the office, delivers his ultimatum, and without giving you a chance to think, or talk, indignantly staggers out again. Don't waste any pity on him for being a sick man: He is a skunk, and that is all.

You with your hands full there, and I with mine full here, and he, ordering us around like his slaves!—Don't submit to it, and he will collapse like a house of cards. Put your back to the wall and fight, old man: It is your only chance of success with him. There is no "*Sua viter in modo*"

2183 with that skunk.

After careful consideration, I wired you yesterday morning, addressing one cable to the firm: "Advise him come here if absolutely necessary (I) shall not return immediately; negotiations are in progress with Barth (regarding C C C)."

This will show, that I cannot leave those important matters now, and also, (to him) that I am not his lackay, but that he has got to await our pleasure: He would jeopardize his interest just as much as our by having me rush off now; it would also show him his power too much. My object in having him come here is, to get him away

2184 from you and thus relieve you, and 2ly to give him a dressing down which he won't forget. It is no further for him to come here, than for me to go there: He has nothing to do, and I have my hands full. If he does not leave New York then get him busy on P. W. & S. and preferably at first anyhow, on collecting the Orleans advance. If he can be disagreeable to you and to me, he can make himself equally disagreeable to these other people, and that will occupy his mind.

My cable to you privately was "Show Blackmer (the London) agreement (and arrange that) he

talk (to) W. V. G. (1) suggest (that W. V. G.) 2185
obtain money (under) false pretenses."

The latter he did by signing the agreement to arbitrate (which was nothing new, but is already part of the partnership contract) and drawing the \$5,000 in fact more, by a syn. game). Not having heard from you since, I suppose, Mr. Blackmer succeeded in muzzling the skunk. I enclose a letter to him which please hand to him, if my suppositions are correct, and if the matter is not fixed up, when this letter arrives.

Ever yours,

RUDOLF.

2186

Keep up your courage and good luck, old man: You will feel better after having knocked him out. If the skunk wants anything without coming to see me here, then tell him to write to me direct and save yourself trouble.

FFT./M Sept. 5, 07.

DEAR MR. GILLET:

I have a cable stating that you refuse arbitration and that you demand satisfactory arrangement by Friday, *i. e.* within three days.

Am I to understand that you intend to break the agreement, which you signed in London, and that your signature is worthless? And that you therefore obtained the \$5,000 (and more) under false pretenses? 2187

I hope, that letters from you and Mr. Kessler will correct my present impression. If not, you will deeply regret your attitude. I advise you to keep on good terms with Mr. Kessler and with me.

At all events I want you to leave Mr. Kessler alone, who has his hands full with running the business. As I am not going to abandon the business, on which I have been working hard these last

2188 two months, I suggest that you come here to see me, if you are in any hurry. If you do not come, then I want you to get busy and have that Orleans County Quarry loan at last taken off our hands. I also want you to get rid of Pittsburg Westmoreland & Somerset underwriting, or of the respective bonds and stocks.

Yours truly,
 RUDOLF FLINSCH.

**Receiver's Exhibit 33, Jan. 8/08,
 J. O. N.**

2189

FRANKFURT/M.
 FRIDAY, Sept. 6. 07.

DEAR ALFRED:

I am wiring you today, "Handelsbank Basel will accept drafts of fcs 250,000. (against) commercial paper in the place of bonds (as proposed by them some time ago); await arrival of mail". (The first 2 words "Minga 1800" were meant for Nestle as the lowest selling price of Olga's launch at Lloyd Neck)?

2190 Enclosed is the Handelsbanks letter, on which you may at, if convenient, I am writing them today, to say that I have forwarded the letter to you, but that, of course, I do not know, if you have occasion to use it. We have to bear in mind, that others may hear of our putting some security behind some of our drawings and they may then ask for the same as well. If you draw on Handelsbank better spit up notes and send them suitable reports of commercial agencies along, which may prevent their asking Chase National Bank for same. Also explain briefly (as I have already done verbally) that these commercial notes are secured in some way, goods sold in advance, accounts receivable well distributed and first sanctioned by

our Credit Department, etc., just a brief statement 2191 reminding them of nature of this biz., as reported by me, where the capital of the borrower is not the security of the greatest importance.

I am just back from a very satisfactory talk with Borgnis. Please tell Howard Taylor that he suggested we make a settlement, they being still very willing to do so, had been willing all the time; but he had doubts about the attitude of the lawyers in whose hands the matter was; I took the liberty of enlightening him on that score and he suggested that he and I go to Paris beginning of October to see Hugo de B. & Cachard or Robinson (of Coudert's). I feel sure we shall agree on some- 2192 thing and T. need not bother about the appeal; if old Hugo d. B. should be quite unreasonable, well, then we shall have to go on, but neither I, nor Borgnis, anticipate it. Of course, this is not a settlement, but I think T. can tell Coudert's that we are in a fair way to reach one.

Now, between you and me, I have told B. about Mr. Gillett, and that Mr. G. might make things hard for you and me personally, if Bathmann presses us too hard; this will enable me to either string Bethmann until we can see our way clear to do something, or, if possible, we might get him in with us, in place of Mr. G. Stranger things 2193 than that have happened. Borgnis will send me a copy of Mr. G's statements to him regarding D. & S. W., when Mr. G. was here in February 04, bless him. They will be usefull in talking to Mr. G. later.

RUDOLF.

2194 **Receiver's Exhibit 34, Jan. 8/08,
J. O. N.**

BADEN BADEN,
KURIANS SCHIRNHOF
Sept. 10, 07 Tue.

DEAR ALFRED:

I just received, via Fft. your letter of Aug. 30, also cable. "Bougy can sell 10 lots Kouwenhovur street opposite factory \$5,000. cash; shall we accept?"—Of course, I was pleased with the good part of the news which you give me in your letter but much disgusted with Mr. G's request for
2195 \$15,000.—to margin some loan of his, which, by the way, under the partnership contract, he had no right to go into; if he had wanted to borrow money on good collateral with margin, it might have been different; but I share your view that his request was "checky," especially, when the London agreement distinctly states, that he shall have no money from K. & Co. until arbitration is concluded, *i. e.* in November. Evidently, from the cable since received from you, this was the beginning of his attempt to disregard his London agreement.

The draft on Len & Co. must have gone through
2196 y'day; not another Schunck, fiasco, I trust. From my letter from Zurich, you will have seen that escrow for j-/A in your hands is O. K.

You tell me "Bougy thinks he can sell all cars with slight reduction"; I presume he has some good reason for not having done this already in line with my repeated suggestion to sell at "any decent, or even indecent price"; possibly, he feels certain that by waiting a little he will sell at nearly full price and thus not create a precedent. Tell him, not to miss his chances and that money in the till in times like the present is a mighty good (and rare) things to have. Regarding those 10

lots on the W. side of Kous— Street, they are no²¹⁹⁷
 use to the D. Mfg. Co., which has enough lots
 in its main property for a good deal of development
 to come, especially if some snap be made with the
 Steinway estate for a larger tract. If these 10
 lots are sold and developed by the buyer's the main
 property will enhance in value. Therefor "let her
 rip" at \$5,000. If B. cannot get a better figure,
 I assume, he will try the latter anyhow, so I am
 not cabling about it.

Regarding the interest on C. C. C. advances to
 Syndicate members, I wish you had followed my
 suggestion to send out a notice to them "that
 henceforth, in view of the general etc. etc. * * * ²¹⁹⁸
 the charge for carrying this advance will be at
 the rate of 8% p.a. int. instead of as heretofore at
 the rate of 6% p.a. int." I do not see how you can
 charge them retroactively a commission of 1% or
 2% ; we made 15% commission at the time we got
 all these people in to the syndicate and therefor
 are offered to carry them at 6% p.a. for the life of
 the syndicate, *i. e.*, until May 15-07 was not unrea-
 sonable. When the syndicate was renewed for one
 year by the managers (not K & Co) we allowed
 the advance to run along at 6% p.a. but assumed
 no obligation to continue them. You will remem-
 ber one man asked for some such obligation, but ²¹⁹⁹
 we only agreed to carry "for the present" at 6%. I
 wish you would at once get Nestle to draw up a
 notice in line with my suggestion of (?) and of
 today and you will find, as already stated, that
 some will pay up, who find 8% too much to pay.
 It would have been unwise to raise the rate on, or
 soon after, May 15. It might have aroused criti-
 cism; but this will not be the case now. When Mr.
 Blackmer now thinks, that we ought not to lose
 on the transaction, he means that the difference
 shall be paid to us out of the (I believe) \$13,000.
 —\$15,000., not so far divided between him and us.

2200 Dont bother about this now; you might mention it to Nestle, to post him.

I shall write to Direktor Hirzel at Len & Co just to keep in touch with them. Brupbacher is on his two week's holiday now; I mention this, in case you make them some offers of commercial paper or discounts these days, as, in his absence, they may not be open or ready.

Ever yours,

RUDOLF.

**Receiver's Exhibit 35, Jan. 8/08,
J. O. N.**

2201

BADEN, BADEN, KURHAUS SCHIRMHOF.
Sept. 26/07, Thursday.

DEAR ALFRED:—

In receipt of your lines of Sept. 3rd, none of your news have reached me. I hope this augurs well for your having succeeded in handling Mr. G. right. From your letter I gather, that you are in the proper temper and Willy, to whom I showed your letter, also thought that you did not seem to be put upon. Regarding the participation of over \$100 M in C C C syndicate, it is easy enough to
2202 answer that Mr. G. has already got us in to the tune of \$185 M for D. & S. W. coupons and that to that effect we did not take a C C C participation, but simply kept what we had already, only in far better shape than before.

Whatever may be the present attitude of Mr. G, it is, in case of need, proper to point out to him, that whatever his intentions are, he will be better off, by letting me finish here first, before returning (X).

Tell McLean that I got an answer from Schroeder of the Discounts, London, saying that he was again confirming to you his readiness to do cable

again check transaction. I also have a letter this 2203
 A. M. from Willy, setting forth his views, which
 are, as always, very fair and reasonable. I found
 that he knew much less about our interests, than
 I had assumed in consequence of your frequent
 correspondence with him: I told him that I was
 now bending my energies on Damiler and C C C,
 for which I was chiefly sponsor, the same as for
 L. A. and U. B. in which latter, however, nothing
 whatever could be done now: I also told him that
 of the newer things the commercial accounts, like,
 Milne, in times like these were quite a burden, as
 was stock accounts, which you had been expecting
 to pull up again some time or other. Mr. Gillett's 2204
 things, O. C. Quarry and P. W. & S. were equally
 a drag at present.

The air and rest here has done me good: Still,
 I felt tired after the day with Fulton, and after
 talking to Willy (who also came to supper at my
 mother-in-law's) a week ago. I expect to write
 Nestle to-morrow. I will now try to get a few
 lines off to Mr. Bernhard.

Kind regards, ever yours,

RUDOLF.

Receiver's Exhibit 36, Jan. 8/08, 2205
J. O. N.

Enro?, London-Manchester,
 SAT. Oct. 5, 07.

DEAR ALFRED:

I went to Stuggart last Sunday upon Jellinck's
 request and will try to get a letter off to Nestle
 by this mail about the result, which I briefly
 stated in my Monday's wire from Fft. "Jellinck
 has made a very favorable proposal; I will close
 next week in Paris. Have you sold Dreyfus; my

2206 address on Tuesday will be Brussel, Thursday, London."

You wire at Belle Vue in Brussel next morning was not refreshing; "Dr., nothing can be done; try again Heine."

I spent all Tuesday with Barth on C. C. C. matters, also paid a few calls with him and stayed over until Wed. noon to do all I possibly could. I could not get my wire off until reaching Dover, being very much rushed for time. "Barth wants begin next week; when did you send map. Will Orleans C. Q. Co. pay? (my address is) Quansions (Q. A's & M's)."

2207 I spent Thu. & y'day in the city, having received your wire Thursday evening; "Orleans cannot pay; try to arrange with German Bk of London (or) Smithurns \$100,000 (on) Orleans Breweries collateral, both (have) increased earnings. Have sent you maps Fft. Sept. 24. Orleans decision (will be rendered) Oct. 24th."

The maps I hear were forwarded from Fft. straight to Barth by Olga. This prospectus is going into print and he was anxious about that map. I expect to go to Brussel a day next week, say Wednesday, when I am through Paris.

2208 Union Discount. Nugent seemed pleased at the increase in business but also said that "what neither he nor I had thought of when making the arrangement was the fact of 4 steamers going weekly and that thus, at the present, they had £100,000 out for us, and whether, when I got back, I would not mention to you to try to keep it up at £50 to 75/2"; It was at luncheon and very pleasant and I promptly said I would write you about it, as he seemed disinclined to do so; (I told him, I was not returning immediately to N. Y.); he urged me not to write you about it, as the matter was not hurried. I mention this only to post you. Suit yourself about it.

I talked to manager Wade at the National Disct. 2209 Co. on the lines suggested by MacLean; but they wont do what we want. I tried the same at Reeves Whitburn, talking to young Whitburn, but they wont either, as they always rediscount immediately and evidently cant advance funds that way.

You must therefor find Mullenberg (or whatever his exact name is) and see what you can get out of him, by making him a definite proposition, I suggest.—Vogel dropped the figure of £50,000.—; but to start with better give £25,00.—Vogel understands, that at times in stock arbitrage, the demand for cables is great. He also said, that he had been offered no end of acceptance business agst. 2210 active stock exchange collateral 20% margin 3/8 & 1/2% com. for 90 d-s; but that he had turned it down, not wishing to be criticised; I mentioned to Vogel our drawees Lloyds' Ruffer, Cunliffes; He would not take too large an amount of Cunliffe, although he considers C. very good, though less in the line of finance acceptances.—Of course, for the ca-agst.—check-bus., I presume you would offer Mullenberg other firms acceptances, or demand bills.

At Ruffers I saw de Neuffaille and tried to get them to agree to renew the O. C. draft by letting the O. C. Q. Co. draw on them (you endorsing the draft) thus having it clearly appear as a commercial advance, and not as a "finance paper," against which everybody here is in arms. You have no idea how rabid everybody is against "finance bills." R's said they would write me, but the post was not there when I left the house this morning. I am not staying Q. A's mansions, but at 29 Holland Park Ave., Tel. address; "Pidducks" (Pidducks, London) where my brother in law boards. He works at Ruffer's, and will briefly wire me contents of the letter to Manchester.

I am going there to talk to Willy before going

2212 to see Smithurns, whom I dont know. In fact I had the word repeated from N. Y. and was rather at a loss until happening to mention the word to my brother in law who knew the name. I presume Manchester works with them and I will then try them; I do not think it any use to go and see German Bank; wrote you already in June there was nothing doing there as they could not place their increase of capital stock.

Glyn's (Maurice) & Comliffes all right. Both wanted me to come and stay with them in the country but I had to decline. They do not expect very tight money here; that is the general opinion.

2213 But they all want American drafts kept down, in order not to get swamped.

Yours

RUDOLF.

(X. write H. K. G.).

19th Sept. 7

DEAR GILLET:

I understood from Flinsch as per agreement made with him you would discontinue drawing on the firm, for your daily needs, but I happen to notice you keep drawing checks, against the understanding you came to with him in London.

2214 When you insured our firm, you told me you had more money than ever you would need and that you would only use the firm's money to the extent of \$10,000. a year. To day your account stands debited with over \$37,000/, which is not in line with your promises and moreover contrary to your written agreement with Flinsch.

In former days you used to keep an account with N. Y. Trust Co. and draw cheques on them.

Enclosed is a letter I received a little while ago from Kessler Estate which you might carefully peruse.

Yours sincerely,

ALFRED KESSLER.

Receiver's Exhibit 37, Jan. 8/08, 2215
J. O. N.

PARIS, HOTEL CHATHAM,
 Tue. Oct. 8th '07, morning.

DEAR ALFRED:

I wrote you on the train to M'Chester on Sat. last 5th inst., had lunch and talk with Willy, returned to London that eve., found Ruffer's letter (my Tel. to my brother-in-law had been far too slow to reach him in time), came over here Sunday, and wired you y'day as follows: "We have arranged A. Ruffer & Sons will accept draft drawn by Orleans (C. Q. Co.) (for) about £11,500. (Due Oct. 13th) under 2216 your guarantee (with the) same collateral (as heretofore) P. W. Kessler expects (to) arrange cash-loan against Cripple (or) Orleans (bonds): Send P. W. K. full particulars Orleans."

I showed Willy your letter and cable, told him of the Dreyfus difficulty of Ruffer's calling off the drawing, of the London antipathy against American drafts, the inadvisability to ask at this time for drawing credit and the almost certain failure of such a request, he told me who Smithurns were and that he was just drawing on them himself. He finally suggested that he try to arrange a loan on C C C or—preferably, he thought,—on Quarry 2217 bonds, either by borrowing cash or by his drawing long on some English firm and paying the proceeds into Glynn for our account, i. e. a cash loan to us in either event. In this way the obnoxious American draft would be avoided: Naturally, he would be entitled to make something out of it for M'Chester: that could be arranged later. I could, of course, give him all particulars about C C C, but of Orleans I have no data, as I really did not expect Seymour would "string" you that long. I should think B/S "P. & L." a/c, possibly a prospectus, which Seymour got up at one time for the sale of the bonds, the re-

2218 cent earnings, could be sent off to him immediately; he thinks these bonds will appeal to lenders sooner than any stock.

Willy also said that he intended to cable to Henry yesterday, what, he did not tell me, but only mentioned, that he might, as a strictly temporary accommodation, allow you to draw on M'Chester, if you could sell the bill. He also intimated that he might suggest to Henry to have you sell stocks.

Ruffer's letter is enclosed: Their personal note to me reads "We beg to enclose letter to your firm in N. Y., which please forward after having taken note of it's contents. Time being rather short, our
2219 acceptance maturing October 13th. Shall we cable to N. Y.?—at the same time will you be good enough to ask them to forward us copy of the last balance sheet of the Quarry Co.—thanking——"

I answered them: "I thank you for your favor of 4th inst. with enclosure, which I am forwarding to N. Y., asking at the same time that a copy of the last B/S of the Quarry Co. be sent to you. Referring to your suggestion to cable to my firm, I am already telegraphing to Messrs. K. & Co., and shall add the necessary instructions. They will pay your acceptance maturing 13th inst., and you will accept the Quarry Co.'s draft, endorsed by my firm upon
2220 presentation.

Y. Rft."

I thought, I have a try with these people for this renewal, notwithstanding everybody evidently considering them such terrors. Mr. de Neuffaille received me and I told him, that you had, as already intimated by your reply to their letter calling off the drawings, asked the Quarry Co. to pay off the loans, but that they would like to renew their season's business, etc., not closing until later in the year, and that I, as long as they and everybody objected so much to what looked like straight "fin-

ance bills," suggested the Quarry Co.'s drawing direct upon them, you endorsing, etc., etc. He said they would discuss it, and write me. I wrote, and write, and cabled all this so much in detail, in order to avoid any possible misunderstanding, especially with such arbitrary people as Ruffer's. Of course, you understand, that you will endorse this Quarry Co. draft and I did not put a word to that effect into the cable.

Be sure to get a B/S and send it to Ruffer's; at that time, of course, they will already have accepted the draft, but that makes no difference regarding attention to their wishes.

I hope, I have forgotten nothing. Y'day, I had a whole day with the Mercedes and Daimler people, who had and are having their annual pow-wow, and a pretty important one it is, with a thorough house-cleaning. There seems clearer sailing ahead than at any time heretofore. I am writing to Nestle about it so as not to burden you too much, he had better show you the letter, discuss it with Bouggy and then report to you, and then you had best all decide on what answer to write or cable to me.

At noon.

Just had another talk at Dreyfus' with Simonet, who explained that he had not answered my note expecting to see me here again (why?) and because he felt, it was a rather delicate matter to have the firm absolutely bind itself not to grant or renew any other acceptance. Regarding Bache's drafts, he said, B. had insisted on a renewal and they had allowed him to renew for frs. 250,000, which, I believe, is half or less of the former amount, and which he considers quite insignificant. Regarding G. S. & Co.'s dwgs., he reiterated that the present ones would be allowed to run off and would not be renewed. Of course, I told them about the London talk about G. S. & Co., and Kleinworth's, and he

2224 said they had not taken any Kleinworth paper either. He said, in conclusion, that their policy was "a'restrundre," and I think, that and the above is about as much as I can get out of them without getting them angry. They fully understand the position and our views. He told me of your having asked about cable-vs-check (or long?) and that he had replied, and that it was all right and simply dependent on the interest rate, which the Bank would charge them for the advance; a cable inquiry from you would soon bring out what could be done; he expected, that, if only cable-check difference was great enough, it could always be done, (do not, 2225 if possible ask for too heavy amounts), excepting perhaps over the end of the year, when he expects money to become rather tight. I presume, you intend to do something with this at maturity of frs. 500,000 on 15th inst.

I have a wire from Barth saying that he expects me in Brussels to-morrow, but I do not know, if I can get off here.

Just back from Marcuard's; 5:00 P. M. They are pleased to see an increase in turnover, mostly so far discounting Dreyfus; said they wrote you about 1.6% com. etc; look upon situation as unchanged but don't expect any worse condition. No use my 2226 going to see Heine. Called on Cachard at Coudert's, saw him a minute, came back later, was kept waiting, uselessly by stupid office boy; may try see him tomorrow. H. de B. not in Paris just now. Borgnis wired cannot get off, asked me to see Cachard, if I wanted to. Did not really see use of it with H. ded. absent. Now I'm off to call on Dr. Steiner. Will try write Nestle later on this evg.

Yours,

R. FLINSCH.

London 4, October, 1907 2227

Messrs. KESSLER & Co.,
New York, U. S. A.

GENTLEMEN:

We have had the pleasure of a visit from your partner, Mr. Rud. E. F. Flinsch, and have arranged with him in regard to the Orleans County Quarry Co., that we will renew our acceptance of £11,404:—falling due 13 instant in the following way:—the Quarry Company to draw direct upon us, under your point & several guarantee, the security in Bond of the Company and Notes of the Company to remain with the Trust Company as collateral as 2228 hitherto; the margin of 20% being always maintained.

Our commission in this case will be one-half percent.

We await the favor of your advices, and are,
Gentlemen,

Yours faithfully,

A. RUFFER & SONS.

It may be necessary to send over some C. C. C. shares, putting them at Barth's disposal for immediate use in case of his needing them once for delivery, a sort of consignment business. It may be 2229 possible to send them to the Banque de Bruxelles, I suppose, without letting them go out of our hands, they to hold them as our agents until paid for by Barth. You have some shares belonging to the syndicate, and for account of this syndicate they could be held by the Banque de Bruxelles as our agents just as well as by ourselves, and delivery could be made, the proceeds going to the credit of the C. C. C. Syndicate. You better ask Mr. Magie about this, and if I cable "Bruxelles" answer "yes" or "no." I presume you would not distribute anything to the syndicate members until at least 15%

2230 or 20% of the syndicate holdings, viz: 3 or 4 hundred thousand dollars are disposed of & on deposit with us.

Also bear in mind that you may be called upon on behalf and for the benefit of the syndicate to buy up shares at any time, so you ought to keep at least \$100,000 in hand all the time after, of course, liquidating that \$100,000 advance which belongs to the syndicate, and which we financed for the syndicate sometime last August when they asked us to be ready on demand to buy up to \$100,000 of stock in case of need.

I do not think you ever paid that back?

2231 Regarding "Bruxelles," let me add that I will have to cable the name into which these shares on consignment would have to be put, also the number of shares to be put into single certificates, perhaps less than 100 shares for each certificate.

**Receiver's Exhibit 38, Jan. 8, 08,
J. O. N.**

22nd JAN. 07.

MY DEAR WILLY:—

2232 I have before me your letter of the 12th Dec. 9th January and 11th of January.

Flinsch and family are expected here Friday afternoon 25th January. Flinsch is attending to Diamler matter and I hope to be able to report next week.

Cripple Creek Central. We have not tried to make a market, but are waiting for public interest in the market generally. Our friend Baruch says it would be useless to try and sell at the present moment and advises us to wait for the sychological moment, at which time he says he can dispose of all the syndicate holdings in two days.

McNeill & Penrose are here for the Reduction ²²³³
meeting and I will see McNeill in regard to C. C. C.,
we may make a start and try to sell say two or
three thousand shares. The stock has not gone
down, but sold up four points last week.

I suppose the Tarapaca Bank stock will not be
offered at par to stock holders. If they are I
should subscribe to my share.

Business here is very quiet and very little doing
outside of exchange business. The bears got on
top of the market last week and have not covered,
the consequence is the market is in a sounder con-
dition than two weeks ago; bond business is very
poor and I am wondering what became of the \$130, ²²³⁴
000,000 paid out in interest and dividends 2nd of
January.

Cripple Creek Central dividends were paid to
day.

Please get me some minute information regard-
ing Crooks & Co. Liverpool. The National Discount
Company objected to their bills. Laing, one of
the managers here, says they are making large
profits in his department, but does not know how
the Liverpool end is doing.

In order to reduce our long account with you,
would it help if we transferred the £20,000 Crooks
credit to chartered bank though it is never used up ²²³⁵
to its full extent and Crooks would have to pay
 $\frac{1}{8}$ per cent more as we would have to pay char-
tered $\frac{1}{4}$ per cent. We will try and keep our long
drawings down anyway.

Call money here is three per cent and five per
cent for two months, five and a half to six for six
months; I expect easy money until 1st April. The
lower call money rates do not make much impres-
sion on foreign exchange.

Your Aff. Bro.

ALFRED.

2236

**Receiver's Exhibit 39, Jan. 8/08,
J. O. N.**

15 FEB. 1907.

MY DEAR WILLY:

Thanks for yours of the 2nd inst. At 5 A. M. yesterday the Daimler works burnt to the ground and there is nothing left except the brick building which they stored the gasoline and did the testing. Five new motors happened also to be in the building unburned. They say the Co. is fully insured \$350,000. and now it depends on how soon the company can collect the insurance. Poor Bonggy came
 2237 in crying saying his hard work of seven years had been wiped out in seven minutes. Even if we get all the insurance there must be a loss, though entre' nous in all fourteen 45 hp. cars and 4 70 hp. are saved, 2 being at the Chicago show, 2 in Boston, three at Broadway garage, 3 at Brewsters, having bodies fitted and the rest in the paint shop, quite separate from the burnt property. We can deliver the 14 already sold and have 4 still for sale. We have the Bayonne property valued, \$42,000 which has been sold payable in installments. \$10,000 is due 23rd Feb. Bonggy has also duplicates of all prints and drawings (which the insurance Company must not know)
 2238 We also got the annual payment of \$15,000. royalties from the Import Company. Bonggy of course wants to go right ahead and rebuild, but this we shall only do if the Germans come in or perhaps the Am. Locomotive Company, who I hear are dissatisfied with the Berlier car they are building. If the Co. continues it will be hard to get back good mechanics as they will be engaged by other builders. It is a question in my mind whether we are better off if we get the insurance or whether the Co. would have made money enough, had there been no fire, to really show something for the common stock. Certainly

the sales of cars had been slow and the wages²²³⁹ amounted to \$5,000 a week. But again there is no doubt but that we had the best car built in the States. The Germans objected to the floating debt, now if you get the insurance there will be no floating debt and Flinch thinks they will consider the proposition more readily. Mrs. Flinch and I think the Import Company, who had always been down on the Daimler Manufacturing Company might have caused the fire.

The fire they say started in the boiler house where all the electric wires met. It is impossible to say anything yet except that the Co. was fully insured.

2240

Act in Tarapaca Bank stock as you suggest.

There was no business in Jan. but this month is quite good. In haste, best love,

Your Aff. Bro.

ALFRED.

2241

2242 **Receiver's Exhibit 40, Jan. 8/08,
J. O. N.**

Per "Majestic"
KESSLER & Co.
Bankers.

54 Wall Street,
NEW YORK, 18 Feb. 1907.

MESSRS. KESSLER & Co., Ltd.,
Manchester.

DEAR SIR:—

We beg to notify you that we have withdrawn
2243 \$18,000 Pikes Peak Hydro Electric
1st 5% bonds..... \$14,400.
and have placed in your escrow
\$3,000.—Muskogee Gas & El. 1st and
Ref 5% bonds at 85..... \$2,550.
and a final payment on 1000 Shares
Underground El of London of
£2.10—per share 12,143.75

\$14,693.75

We are informed that the Muskogee Plant is
earning more than twice the interest on the bonds,
2244 which insures the 6% div. on the preferred stock
of which there is only \$280,000. outstanding and
which is the total issue.

Yours truly,
KESSLER & Co.

Receiver's Exhibit 41, Jan. 8/08,
J. O. N.

2245

FEB. 25th, 1907.

MY DEAR WILLY:—

Tarapaca new bank stock I am quite willing to take and pay for as it is a good investment and I have more money lying with you than I need.

Stocks except tobacco are all down on account of Harriman investigation, but I expect an improvement next month, and would advise holding say till 1st April, if her money is really needed. I must say personally I do not care to invest in John's business, besides I am still owing the estate 2246 money.

The Daimler is building its repair shop again as we have at ——— to make believe the company is going to continue, otherwise we could not sell the 18 cars on hand.

Receiver's Exhibit 42, Jan. 8/08,
J. O. N.

"Deutschland."

15 MARCH, 1907.

DEAR WILLY:

I have not written you since 25th Feb. As you 2247 may imagine we have been going through pretty worrying times. In fact yesterday's drop in prices was worse than August 1893 or May 1901, for so many stocks melted away 25 points within an hour. To-day exchange was almost unsaleable on account of the amount of stock bills. Europe must have bought over 200,000 shares yesterday and to-day. Demand exchange sold at 482.05. I sold some yesterday at 484, 483.90, 483.70, 483.50, 483.25, 483.10, but only small amounts.

I have asked Flinch to write you re Daimler & Siedenbourg.

2248 Sidenburg case was decided against us, after three and one-half days, on the ground that our paying them \$40,000 made them hold on to their speculation, which caused them a loss of \$23,000. more. In other words, the speculation was only closed out the day after Lurman failed.

Howard Tailor would not let the case go to the jury, which Mrs. Flinch (who was present) said was a mistake as she could see they were in our favor. We found out afterwards ten were in our favor and two against. Tailor is quite confident he can get the verdict reversed in a new trial but wants to wait until he wins the Herplotz, Korn case again; 2249 as you know we won the first trial and again on appeal.

Gillett as far as his working is concerned is getting worse and even Mrs. G. now admits it. They sail 21st per America for La Malou, he intends to take four times 21 baths and quite expects to return in July without a man or even stick.

Your Aff. Bro.

ALFRED.

**Receiver's Exhibit 43, Jan. 8/08,
J. O. N.**

2250

28TH MARCH, 07.

MY DEAR WILLY:—

Thanks for your memo of 18th inst. Enclosed I send you report of Red and Ref. & Comstock Tunnel.

Your question as to cause to our slump is very difficult to answer, but I will try by stating it was due to a conglomeration of circumstances and practically started at the time Harriman declared ten per cent on Union Pac. and he had told several of his rich friends in advance and a 200,000 shares pool was formed to sell out at 200. The stock only

reached 197 and from then on down to 180. Kuhn 2251
 Loeb and Harriman were selling the stock in large
 amounts knowing what was to come out at the trial,
 when Roosevelt insisted on the investigation.
 Roosevelt, I think only wanted to show up the mis-
 deeds of the directors of the U. P. But the press
 would have it, he intended to have every prosper-
 ous company investigated. The State legislature
 thought they also should have something to say and
 as the railroads some time ago refused to give poli-
 ticians free passes, they retaliated by instituting a
 two cent per mile fare for all passengers irrespective
 of density of population, which of course is absurd.
 They intend also to reduce freight rates, which 2252
 owing to increased operating expenses, labor 20 per
 cent and ——— charges for material 20 per cent
 or more, would leave no dividends to stock holders.
 Then too, J. J. Hill thought himself mightier than
 the money market and made the big new issues of
 stock of Gt. N. and N. P. Railroads. The followers
 of Hill and Harriman have been hurt most and Cor-
 nelius Vanderbilt and Robert Goelet are said to
 have lost each \$4,000,000.

The scarcity of money both here and in Europe
 caused by the unprecedented increase in all business
 transactions, of course, helped the decline in stocks.
 But foremost without a doubt was the loss of con- 2253
 fidence caused by the interstate Commission of in-
 quiries into Railroad and industrials which are now
 being punished and fined for rebating, which is
 against the Sherman Act. After all the tumult it
 will be interesting to know if Harriman has lost
 control of U. P. Some will have it that J. P.
 Morgan has the control. I think Rockefeller and
 the City Bank.

You will be very sorry to hear that Ed. Willis
 died the other day—of course you heard he was in
 a sanitarium since last September and could never
 get better. Ada is in Ballston for ten days—she

2254 returns Monday. I would have gone there over Easter, but McLean is on his vacation and only returns 3rd April. Exchange has been as nervous and feverish as stock market and one has had to be more than careful buying exchange. Corbin B. K. G. Co. but we are not interested. They were loaded up with real estate.

It is awfully hot here, 76 at 8:30 this morning. Best love to all.

Your Aff. Bro,
ALFRED.

I agree with you Rome is most interesting, so are
2255 some of the smaller towns in Italy.

**Receiver's Exhibit 44, Jan. 8/08,
J. O. N.**

8TH APRIL, 1907.

MY DEAR WILLY:—

I have before me your letters of 8th, 16th and 23rd March and I take note you have taken up the 33 shares Tarapaca which is O. K.

2256 Herklotz Corn appealed again. I saw Harold Averdieck several times, he lunched with us at home also with Clinch, he was only here a few days.

McLean returned Friday 5th April, he could not have gone away at a worst time, foreign exchange was as nervous as the stock exchange. Corbin banking Co. failed, we were not interested, but I understand Bank of Scotland paid out £100,000 day of the failure. Muellerschall just escaped losing £20,000 which was paid in London the day before failure. Park Bank, Bank of Hochologa, Yokohama Specie Grace Sovereign Bank of Canada all figure as creditors, also the Russian Bank who only started here six weeks ago. I think that creditors will fare bet-

ter than in the Cebalos case. Now McLean is back ²²⁵⁷
 I shall take up balance sheet, it does not show up
 very well, for after crediting up 5% interest on capi-
 tal account there will be a loss of about \$35,000
 composed of half Cebalos debit (\$12,000) and Chi-
 cago Great Western Syndicate about \$25,000.
 which must be written off. This latter was entirely
 Gillett's affair. Now as to the C. C. C. commission,
 Flinch explained to you that it was booked pro rata
 to me, Flinch and suspense account K. K., Gillett's
 share going against D. & S. W. upon advance ac-
 count. If you take this into account \$90,000 could
 be added to profits say on commission account. Or
 in other words a profit of \$55,000 after paying \$50, ²²⁵⁸
 000 (5% on capital account).

**Receiver's Exhibit 45, Jan. 8 08,
 J. O. N.**

1 MAY 07.

MY DEAR WILLY:—

Thanks for declaring three per cent on K. & Co.
 ordinary; please let me know how much you have
 on reserve account now and what was the amount
 you booked on this account for 1906. Enclosed I ²²⁵⁹
 return you receipt for £294.95 as requested.

Daimler insurance money started coming in last
 Thursday; so far we have received \$108,000. some
 companies deduct one per cent others one and one-
 half per cent, others pay in full. (There are 153
 companies in all.)

Money market is much easier here $2\frac{1}{4}$ on call
 $3\frac{3}{4}$ 90 days, $4\frac{1}{2}$ six months and 5 to $5\frac{1}{2}$ one year.
 It also seems easier with you. I expect easy money
 anyhow until 15th July, by that time the remaining
 \$56,000,000 Gov. bonds due 1 July will have been
 paid off and the sentimental effect will disappear.

2260 If we have bad crops time money will be a drug in the market at 4 per cent and our bonds will appreciate and reach top prices, they have already recovered three points on an average since end of March and Bertie is getting busy again.

ALFRED.

**Receiver's Exhibit 46, Jan. 8/08,
J. O. N.**

28TH MAY 07.

Teutonic.

2261 MY DEAR WILLY:—

We are all very blue in Wall Street, three days heavy rain, blizzards, and now storms up state and out west.

Now to answer your question in yours of 1st May.

C. Gt. Western stock is what we received in place of interest in that silly bond syndicate, which W. K. G. made us join.

C. Schaller No. 2 Flinch gave him a share in the Cripple Creek Central Syndicate, hoping to help him out on his U. Breweries, which you remember is one of the accounts Gillett did not take over.

2262 Kuebler account must be familiar to you as it has not changed since Gillett joined the firm, it represents Daimler common stock and United Lighting & Heating stock. Whatever happens one-half of this must be lost unless U. L. & H. should pick up, they earn and pay the div. on the pref., but nothing on the common.

Daimler Company has so far collected \$205,000 of insurance money, the remaining \$100,000 will only come in after 6th June.

Los Angeles Water. Lamb is going there with his family end of June. He is most enthusiastic and figures the 1600 acres ought to be worth \$500.

or \$800,000. He will remain there all summer and 2263
hopes to develop it.

Clinch sails for Europe 15th June. Best love,

Your Aff. Bro.

ALFRED.

Our share in P. W. & Summerset is \$50,000.

Receiver's Exhibit 47, Jan. 8/08,
J. O. N.

K. W. II

KESSLER & Co.

54 Wall Street.

2264

Bankers.

NEW YORK, 8th July, 1907.

Messrs. KESSLER & Co., Ltd.

Manchester,

DEAR SIR:—

We have withdrawn from your escrow

1,000 Muskogee Gas & El.	\$	850.
60,000 Orleans Quarry with note for		
\$45,000		45,000.

\$45,850.

and placed in same

\$40,000 Synd. Participation Western

Pacific 1st Mortgage 5% bonds paid
in.

2265

7,234.38

548 Ch. Ot. W. Pfd. B at 16.

8,768.

and Title deed to 1018, 1020, 1022 Bedford Ave. Property, Brooklyn so called Mackay Mortgage—1018 and 1022 are free and clear; there is a mortgage on 1020 for \$9,000 outstanding. We are bid \$42,000 and are asking \$47,000.

31,000.

\$47,002.38

Kessler & Co.

2266

**Receiver's Exhibit 48, Jan. 8/08,
J. O. N.**

9 JULY, 07.

MY DEAR WILLY:—

Thanks for yours of 4th and 25th June.

I take note of what you say re Los Angeles and I hope to hear something favorable shortly. I think Lamb is a reliable person.

2267 There is no market for good bonds at present, let alone outside things like breweries. I am afraid there won't be any market for bonds until all the railroad notes giving five to seven per cent are out of the way; for instance two months ago the Central and Lake Shore notes were selling at 100 and int. to-day one can buy at $98\frac{1}{2}$ and $98\frac{3}{4}$ and int.

Time money here is four and three-quarters for three months five per cent for four and five months and five and a half to six per cent over the month of January.

2268 Business has been rotten the first six months of the year but there is a little more doing now. Our commission account is about 1000 dollars better than last year; exchange and interest account I cannot tell until the half year accounts are all booked and we get our accounts from abroad. I was pleased to hear you had £18,000 on reserve account and that you expected to pay 5% on ordinary shares next year.

ALFRED.

**Receiver's Exhibit 49, Jan. 8/08,
J. O. N.**

2269

23 JULY, 07.

DEAR RUDOLPH.

I received yours of 1st, 9th and 11th July and have taken due note of same.

In yours of 1st July, you say I am to pay Harold Gillett \$500. on the 1st Aug., in yours of the 11th July, I am not to pay. Does Gillett know this. And what if Harold draws checks on us.

C. C. C. Blackmer is away, but we have a wire from McNeill, stating you are at liberty to shave in 2270 Com. of 5%. B. wrote you a long letter on receipt of your letter to him. He evidently does not want to give options, which afterwards may fall through and it is much oposed to taking Beaver stock at par from C. C. C. unless at least \$500,000 cash is realized by sales of C. C. C. Syndicate stock.

Bonggy is coming in to-morrow, to see me about Daimler business and his man who wants an offer of the business.

Schunck & Co. At the N. Y. Trust Company they call them Skunk & Co. which name suits them down to the ground. We received our escrow back to-day, and the \$45,000 out of the \$78,000 I can easily dis- 2271 count here with some Milne and MacLea notes. Rotograph are renewing their \$30,000 for three Ms. They fall due 26th and 29th July. W. B. has sent us a check to meet their note of \$20,000 due to-morrow. MacLea account stands to-day at \$81,000. Milne at \$92,000. Their sales in July have been very small owing to a row on with Horrockses of Manchester, who have been sending goods direct to their competitors and underselling them in spite of contract made with Milne giving M. T. & Co. the N. Y. field exclusively. I believe Milne sailed 20 July, but am not sure. The meat bag account is growing.

7
5
7

2272 MacLea never knew Milne besides MacLea Sr. is in Europe so I could not ask him about Milne for Andrea.

Orleans Quarry. Seymour is still busy getting signatures and is very hopeful, I never expected they could pay 1st July, nor was it in any way possible. Harvey is out of debt and is ready to go in again. Law suit is progressing and on Friday will continue. I understand that so far the only claim the opponents make is that \$6,500 was omitted in the assets of the Medina Quarry and as the Orleans people represent 90 per cent of Medina bond holders, the difference would only be the remaining 10%

2273 or \$650.

Muskogee earnings are improving and June earnings show \$700 net over fixed charges and div. of 6% on preferred.

Dreier said it was not understood that he should pay on a certain date and when I called him up he said he would not be paid until end of July if then so he gave a note for \$6,200 due 27 July, I tried to make him add interest for one month, but he refused. His note will be paid all right 29th, as 27th is Saturday and I will credit Olga.

Your Gillett agreement is O. K. but I am afraid Choate will be rather expensive and I think unwilling to serve.

2274

Best love,

Yours sincerely,

ALFRED.

How about Anglo F. on Muskogee and Orleans in place of C. C. C. You might suggest it to them.

Receiver's Exhibit 50, Jan. 8/08, 2275
J. O. N.

30 JULY, 07.

DEAR RUDOLPH.

I am in receipt of yours of 18th and 19th July.

Schuncks. You know what I think of them, they certainly ought to bear all cable charges and escrow charges and int. at 6% for any delay in this transaction.

Blackmer. I know nothing about his cable which you say you received 18th July. He has been away for a week and returned this A. M. I had a talk 2276 with him, but he did not mention your letter to him.

Seymour is also out of town for a week and only returns Thursday or Friday. McLean wrote you he had \$124,000 bonds underwritten out of \$173,000. I have not heard anything more about Lawson.

C. C. C. has now a balance of \$131,000 with us. I made a calculation the other day and find it has cost us \$14,000 more, carrying the Syndicate including our own than the 6% debited to the different accounts. This is to June 30, 1907. How are we going to get this back?

I don't think Heine will loan on C. C. C. Credit 2277 Anstalt might and maybe something could be done with the Banque Suisse Francaise, Paris.

Manchester. Willy only wrote me last week, he seemed to be using their credit to full extent again and presume some of our credits had been called, and requested me to keep the account down. I have not written him we would like to extend our line £20,000 for one drawing, but may do so if Orleans does not pay up soon, though I hate to do it.

Cable. You ask whether McNeall of Blackmer accepted K. & Co. getting Com. on C. C. C. sales, it was Blackmer but confirmed by McNeall in a tele-

2278 gram from Colorado 3 days later on strong urgency request from Blackmer.

Barth. You know I am much against renewing this commanditaire business but cabled you yesterday Leopold France, 25,000 if absolutely necessary. That means not to do it unless obliged to and then to make the amount as small as possible. I would prefer Frances 10,000 to 25,000 if possible.

Bougy, was in the other day, he would not give name of party, but said he was quite reliable,—but that they only wanted to buy the patents. I told him he ought to see if he would not buy a lot of the stock and told him it might be hard to get the majority. He went to see the man again and he was 2279 to give him an answer this week. I expect B in any day, probably to-morrow. If Charley has sold out his interest in Societe Mercedes, would that affect our royalties?

Gillett, you have never once stated how his health was and whether he can walk alone. Please do so. We just got a cable from him stating he would sail 14th Aug. Oceanic.

Stock market is professional and time money very tight. Call money easy at 3 to 3½ per cent. Very little business doing though many are very hopeful. Drier paid \$6,200. to your wife's credit 2280 and I returned him his note.

Kind regards,

Yours sincerely,

ALFRED.

Nestle says nothing from Mattheson yet.

Receiver's Exhibit 51, Jan. 8/08, 2281
J. O. N.

2 AUG. 1907.

MY DEAR FLINCH.

Your Cable "Edgar will pay August 12th, Ms. 40,000" & McLean is attending to same. I also received your letter of 23rd which was enclosed in Beathmann papers.

In regard to Henry Clinch accounts, would say that it is becoming harder and harder to sell exchange, some of the up-town dry goods houses have stopped buying our bills but maybe it is because doing MacLea, Milne, Shipley Blauvelt business interfere with them. The Chase and Park National also don't pay them any more. The Park Bank also called our loan giving us thirty days to pay it off in but I saw Delafield and he said he was getting tired of always the same collateral. He was willing to extend it fifty per cent to be paid 1st of October fifty per cent 1st of January and also wanted us to have a larger balance. However, he was very nice and introduced me to his loan clerk and said to him in my presence now this is what I want done (as mentioned now if Mr. Kessler does not pay one half one of Oct. never mind, in other words I want to leave to Mr. Kessler to decide what he will do. As you know we have

\$100,000 Breweries, at 80.....\$80,000.
 \$50,000. Pitts W. & S. at 90..... 45,000.

125,000.

in that loan \$100,000.

Of course, I shall not pay \$50,000, 1 October, but we must probably change part collateral 1 Jan. With all these difficulties I think it very wise to get Henry Flinch to relieve us. We are again trying to sell Dreyfus long.

2284 Money is very stringent, $6\frac{3}{4}\%$ was paid on Industrials for four months yesterday. I had \$110,000 bills receivable and tried the N. Y. Life (three months bills). They said they had no money until next week and it would be six per cent and they could not promise to have any for me.

Under the circumstances I wired you yesterday, "Henry will forward securities (to Flinch & Co.) next week." Magie only returns Tuesday and he will have to split up the syndicate stock which he can only do approximately. Also I notice \$12,500 U. B. bonds, of course we can only send \$12,000 as there are no half bonds.

2285 I don't see how it can harm us, as you have only to say that owing to the very firm rates, especially on outside collateral, it is cheaper to carry them in Europe at present.

I sent your one sheet to Bouggy, he sent word that this probable purchaser of Am. Mercedes Co. could do nothing at present. Bouggy has gone yesterday on a week's vacation.

Yours sincerely,

ALFRED KESSLER.

Milne is expected to arrive to-morrow.

2286

**Receiver's Exhibit 52, Jan. 8 08,
J. O. N.**

2 AUG. 07.

DEAR WILLY:—

Yours of 12th July to hand with balance sheet of W. K. estate to 28th of Jan. 1907.

Gillett has been drawing too much money for living expenses. He has drawn up to date \$35,000 since first of year and F. would not send him the last Fcs. 10,000 he asked for. This brought up the question of the D. S. W. coupon advance account

and the Pittsburg West Moreland & Sommersett. 2287
 They have reached and signed an agreement that matters should go to arbitration in Oct. when they are both back. I expect Flinch will write or tell you all about it, and he can do it better than I can as I did not hear all their verbal conversation.

Salt Creek Oil. Enclosed is a copy of a letter from First National Bank, Douglass Wyoming. I am trying to get further particulars.

Our drafts are running pretty big on you for the present for the very reason you mention. The Dresdner Bank stopped our drawing long, also the Basler Handelsbank wanted A-1 bonds as collateral. Swiss money is too dear anyway. When 2288
 Hardy Nathan went out of business we had £10,000 with them and the German Bank did not want to continue the business. Ruffer also cut us down £10,000.

I may want to draw on you a special £20,000. against Orleans Quarry notes with bonds attached. This loan fell due end of April, but we gave them three months more to pay up in. I am busy trying to get them to pay but suppose it may take two or three weeks still. The Co. last year made \$28,000. above fixed charges, 6% on \$350,000. bonds, \$21,000. I took some of them out of your escrow only a month ago. The Co. reports doing very well 2289
 to-day, we also advanced to them 75% on bills receivable—they pay us 6% int. and 1% Com. every three months. The basis of the loan on bonds is 75% whereas the bonds ought to be worth 90 at least. There are fourteen miles of stone quarries at Medina and Albion in N. Y. State just between the N. Y. Central R. R. and the Canal. There is a debenture mortgage of \$1,200,000 on the property but no interest can be paid on same until first mortgage bonds are paid off.

Meissner. If he had asked Glynn for a L. S. D. Cable, G would have given it him and as to rate,

2290 well I am convinced it would have been more favorable than Browns. I return enclosed his letter.

Flinch is doing some good work anyway. So far he has got Mrs. DeNeuville to pay off her debt to us, \$45,000 Edgar one half his debt? \$10,000. His father's \$70,000 which we ought to have got in 1896. So far the first has gone through, the second 12 Aug. the third about the 18th Aug. I *hope*. If he could only get Schaller to do the same.

Money is very dear on time, so really I don't see how there can be much of a boom but lately our booms start up even with tight money. Crops are not bad after all.

2291

Best love,

Your Aff. Bro.

ALFRED.

**Receiver's Exhibit 53, Jan. 8/08,
J. O. N.**

9th AUG. 07.

MY DEAR RUDOLF:—

Thank you for yours of 26th of July and I passed on your letter to Bouggy who will reply to you direct.

I notice that Remy is going to pay us Ms. 10,000;
2292 every little helps as not only is money very firm at 6 to 7 per cent but most of the banks and trust companies have none to loan. Every one is bidding 6 to 6¼ for sterling loans, but European bankers refuse to be drawn upon.

Orleans County. Seymour has now \$132,090 bonds underwritten. Tukesbury refuses absolutely to sign so I told Seymour to try and place balance including Tukesbury's with outside people. The law suit is over, but the judge says he will only render his decision 3rd Oct. Baldwin is confident it will be in the Company's favor. In the meantime the quarry business is far ahead of last year.

Mrs. Draper is in Bar Harbor, I wrote her about 2293
selling her U. S. Pref. but she has not answered
my letter.

We managed to sell our Dreyfus long but next
week there is some more. Harry Munroe tells me
the reason people don't like Dreyfus is because the
chief people who discount long bills are the rail-
roads chiefly Orleans and Midi and D's son is a
depute and is always talking against the railroads.
Kind regards, yours Sincerely,

A. K.

Receiver's Exhibit 54, Jan. 8/08, 2294
J. O. N.

20 AUG. 07.

DEAR FLINCH:—

I have yours of August 1, 2, 8 & 9, and will
take them up separately.

Aug. 1. Edgar Flinch. The amounts you give
of C. C. C. stock are O. K. 271.95 Pref. and 253.45
Com.

Barth. Nestle sent you a copy of their letter to
us and our reply, but we have not received the
papers yet for our signature

Beaver Land. I asked Blackmer to write you 2295
about same, so far construction has not begun yet
and will take three months at least.

Willy. I had already written him we might
have to draw £20,000 extra ausnahmsweise, but I
shant do it unless imperative. We have to pay off
Dreyfus Friday fcs. 500,000 and Monday fcs. 250,-
000, so far we have not been able to sell. Early in
Sept Anglo foreign £25,000 falls due which of
course will not be renewed.

Fuller gave more collateral. Baker I cannot get
hold of. Mrs. Draper sold her 300 steel pfd. 200
rep steel Pref and Mks 36,000 Hoch Untergrund

2296 Bahn and I paid her \$26,500. Alliance Realty I am only bid 111 flat. I will get Gillett to sell his Devlin bank stock. He arrives to-morrow. I cannot sell G's other thing as they are chiefly Orleans Quarry and P. W. & S. bonds. Douglass paid so did Flynn and the U. Brewery notes have been paid, at least those what were due. What is the matter with you, you seem to be seedy. I luckily am well but worried as you may imagine though sentiment is much better to-day. Drumming Milne and MacLea to sell is quite a job, they both have too many goods on hand.

Aug. 2. I did *not* pay Harold Gillett 1 Aug. \$500. I explained to him and he said he could wait until G. arrived.

Aug. 8. I am astonished that you say your father has no legal obligation on his part for these various advances, for I have asked you once or twice and you said that he *had* acknowledged his indebtedness to K. & Co. I can easily understand he does not want to borrow on C. C. C. stock in Frankfort and as you say it would do us more harm than good, so if he will give us a margin of 70,000 or 100,000 marks, it will always be acceptable. How could you expect C. C. C. quotations to stand up against the rest of the market. U. G. Pref. sold to-day at 35 in spite of the \$300,000 *net* extra U. G. ought to earn since the Golden Cycle mill burnt down. The Common sold at 10½ and then 13, closing 12-14 pfd. 35, 48. I sold about 40,000 worth of securities since I wrote you about selling.

C. C. C. Balance. Blackmer is away so I could not give him your message. B. just came and says he will write you. Since we paid last Div. we have received no more money from Colorado. They have to-day \$130,000 and 10,000 Midland Terminal bonds with us.

Aug. 9. Mr. Magie says your assumption in re C. C. C. stock in case of sale to Barths friends is O. K.

It has been a Hell of a time here and I shall need a short holiday as soon as the skies clear.

Hoping your health is better and that you will be successful in Brussels, I am yours sincerely,

ALFRED KESSLER.

Howart T. is back and wants to know about Bathmann matters. Can Schaller pay something on Stern Mass Gas account.

**Receiver's Exhibit 55, Jan. 8/08,
J. O. N.**

27 Aug. '07. 2300

MY DEAR WILLY:—

I have your of 25th July, 3d and 14th Aug. and the worries I have gone through in the last two weeks have been phenomenal. Cables and correspondence with Flinch and others have taken up most of my time. I communicated at once to Flinch what you had heard from Franklyn, thinking it was much wiser to let him know.

Flinch's brother Edgar paid Mks. 45,000 and Remy Mks. 10,000. His father promises Mks. 100,000, but we have not got it. Mrs. DeNeuille paid everything she owed and his wife Olga 2301 \$6,200.00, plus \$15,000 which I expect any day now.

Drawings. Not having been able to sell Fcs. 770,000 against Cripple Cr. Stock, we were forced to sell £20,000 Manchester, and put up escrow as per separate letter. It is not our choice but the purchasers to say draft should be 60 or 90 days. This present over draft we will see to its being paid back in Dec. or sooner. Of course a 90 day bill would have suited, but spool cotton only buy 60's and I believe do not discount them except as they need them, so you won't have much outstanding in London discount market.

2302 There seems to be several why Dreyfus bills don't go. Last year when the banks were shutting down on discounts Dreyfus continued to be drawn on by Goldman Sachs, Solomon & Bache in large quantities. Goldman Sachs drew one day Fes. 1,000,000 at a clip. Our small drawings don't cut any figure. The credit Lyonnaise Comptoir are down on them anyway for going into the banking business. No one question their means 40 to 50,000,000 fcs. The railroads, Medi & Orleans are large takers of bills and as one of the young Dreyfus is a depute and is always antagonizing the railroads, they hit back by refusing to discount bills on his father's firm. I got a cable from Clinch yesterday saying

2303 "I have arranged Dreyfus will not accept any more bills except ours, saw Heine can be done, await arrival mail." Evidently he has arranged with Heine to take our bills on Dreyfus under certain conditions which he is writing about. Anyhow if others cannot draw on Dreyfus their bills will go without any trouble.

Orleans Quarry. Debentures are as good as not issued, as they are held by bondholder's committee and cannot be given out without retiring the first mortgage bonds.

Los Angeles. Lamb writes a long letter (Copy sent to Flinch) he says the three bids are only \$25. an acre and they have asked him for a counter offer. He says he ought to get much more, as land a mile away is selling at \$250. to \$300. a lot. Los Angeles to-day has 250,000 population against 103,000 in 1900, and the prosperity of the people enormous and on a very safe basis. He thinks by waiting we can realize a great deal more.

2304 U Breweries net earnings for July after allowing for int. and taxes are \$33,000 against \$18,000 July, 1906, and the bonds are above peradventure.

Diamler. I have not studied lately, they will

have three cars for sale. When I get a breathing 2305
spell we will look into it.

West Moreland earnings are not good and I am
getting Gillett to go into it thoroughly.

A. K.

Sentiment much better.

**Receiver's Exhibit 56, Jan. 8, 08,
J. O. N.**

KESSLER & Co.
Bankers.

54 Wall Street,
NEW YORK 27 Aug. 1907. 2306

Messrs. KESSLER & Co. Lim.
Manchester.

DEAR SIRs:

A few days ago we sold at 90-1/2 and Int. \$20,000
Muskogee Gas & El. bonds and withdrew them from
your escrow replacing them by \$20,000 Orleans
County Quarry bonds 1st 6%'s at 90.

We cabled you to-day we had drawn £20,000 60
d/s on your goodselves and have placed in a separate
escrow against this the following.

\$25,000 Orleans Co. Quarry 1st 6's at 90.	\$22,500	
Note \$10,000 Orleans Co. Quarry secured		
by bonds at 75 Nov. 7	10,000	2307
Note \$10,000 Orleans Co. Quarry do. do.	10,000	
Note \$4775 Orleans Co. Quarry do.,		
Nov. 18	4,775	
Note \$8,000 R. B. Maclea Co. due Dec. 5.	8,000	
" 7,000 " " ..	7,000	
" 5,000 " " ..	5,000	
" 16,000 Milne Turnbull & Co. Nov. 11.	16,000	
" 17,000 " Dec. 27.	17,000	
" 7,000 " " ..	7,000	
	\$107,275	

Yours truly,

KESSLER & Co.

2308

**Receiver's Exhibit 57, Jan. 8/08,
J. O. N.**

30 Aug. 07.

DEAR FLINCH

The most encouraging news I can give you is that since Cortelyou has promised the banks 5 million a week until 15 Oct. and English discounts are easier, sentiment has entirely changed for the better. We sold £15,000 demand to Canadian Bank of Commerce yesterday, the first time they have bought our bill since last March. However we still are unable
2309 to sell Dreyfus and therefore cabled you as per enclosed copy 24 Aug. as I was getting desperate. We drew £20,000 on Manchester the other day.

Your cable of 26 Aug. and 30 Aug. here "We have arranged Dreyfus will not accept with the exception of K & Co. Saw Heine too late, can be done, await arrival of mail per, Cripple Cannot be done here (Paris) Frankfort to-morrow, Zurich Thursday."

You cable to-day.

"We have arranged bank Leu joint a-c 8% \$100,000 six months loan against 900 shares Pref. 900 shares Com. (CCC) draw at 90 d/s payable
2310 Paris Banque Suisse Francaise we have arranged also about direct discount commercial paper and our drafts at (Dreyfus 77) London Paris writing."

In accordance with this letter we are drawing to-day equivalent of \$100,000 on Leu, payable Paris, against 900 pref. and 900 com. and hope it will go through all right and not another Schunck fiasco. You do not mention whether collateral should be deposited anywhere, so we keep it in escrow Leu joint account. This can be changed if they insist on a deposit in trust Co.

Gillett has a bad cold and was only down two days. He had the cheek to ask me to loan him

\$15,000 to Jan. 1 to carry his Dayton Toledo and 2311 Itonton notes, for which more margin was called. I said on the contrary I expected him to loan the firm some money. He has looked over the Orleans Co. Quarry and P. W. S. papers, but not at all thoroughly. His absence has prevented me from going over them with him.

Blackmer will deposit \$30,000 of C. C. C. money Tuesday 3rd September.

I have your letters of 15 and 20 Aug. Bouggy has still two 70 Hp. 1 45 Hp. and 2 Demonstrating cars left, he expects to sell 1-70 Hp. Corn Exchange notes are all paid off. Bouggy thinks he can sell all cars with slight reduction.

2312

I note what you say about Seymour paying up part of loan, I have been trying to get him to do this for some time. The suggestion of getting C. C. C. underwriters to pay 8% is O. K. and I intend to work on it. I think a com. of 1 per cent. would be better than raising the rate. Blackmer seemed to think that if the carrying charges cost us more than 6% we ought not certainly to loan on the transaction. But Mrs. De N. has paid off her account now can I debit her with one cent. commission? It would however need 2 per cent. up to June 30, 1907 to make up to come out even and can we go back on your written agreement with them to carry the stock at 6%? It is a very ticklish question and may be better only to consider when the stock is sold. Let me have your views on this.

2313

Breweries have paid off the remaining notes we discounted for them.

Milne Turnbull business is still in a mess, but they have sold \$9,000 of goods this week. Their meat bag account is growing and very satisfactory.

Yours sincerely,

ALFRED.

2314 **Receiver's Exhibit 58, Jan. 8/08,
J. O. N.**

Sept. 3 07.

KESSLER. Manchester.

Vomica spavined emolliated unbegotten straight
cripple voraginous arranging latter, replacing com-
pelling jovial hearken.

vomica	P. W. Kessler
spavined,	loan.
emolliated	payable,
unbegotten	good securities,
straight,	no

2315	Cripple Creek,
voraginous	R. E. F. Lynch
	arranging latter replacing
compelling	drafts drawn on
jovial	R. Samuel & Co. (Louis Dreyfus & Co)
hearken,	financial affairs improving.

**Receiver's Exhibit 59, Jan. 8 08,
J. O. N.**

3 Sept. 07.

2316 DEAR RUDOLF:

Gillett asked us to give up his Orleans Quarry
County bonds (\$20,000) and I refused as we are
using them in K. & Co. escrow. He said how can
quarry company pay up unless I release his bonds.
I said if Seymour was going to pay off loan I would
release the bonds as naturally they would have to go
as collateral for new loan to pay us off. Gillett got
very nasty and said he would give me two days to
make a satisfactory settlement on all points and
that he was not going to arbitrate, as he says we got
him in under false statements, that we had no mil-
lion surplus and that his account ought to be credit-

ed with \$30,000. D. & S. W. coup purchase account ²³¹⁷
 money, that under contract we were to buy no
 stocks, though he himself bought People's Gas and
 St. L. S. W. pfd. for the firm, that we had no right
 to invest more than \$100,000 in a syndicate such as
 C. C. C. etc. though he urged the taking of \$425,000
 St. L. & S. F. notes, \$150,000 C. Gt. Western
 Syndicate and now the P. W. & S. which is an
 unknown quantity.

I cable you as follows: "Gillett refuses arbitra-
 tion demands satisfactory arrangement Friday.
 Should advise you to return."

I received a long letter from the executors W. K.
 Estate addressed to firm dated 23 Aug. (I suppose ²³¹⁸
 you have a copy). I have not shown it Gillett yet,
 it will make him still madder. Probably you will be
 writing about this letter to me. Kind regards,

Yours sincerely,

ALFRED.

Escrow for K' Co.

\$35,000 O. C. Q. bonds

24,775 " notes

20,000 MacLea notes.

10,000 Milne T. notes.

Receiver's Exhibit 60, Jan. 8 08,
J. O. N.

²³¹⁹

6 Sept. 07.

MY DEAR WILLY:

I received your letters of 22 and 23 Aug. and the
 one by the firm of 23 Aug. and I am dreadfully sorry
 to have caused you worry. Indeed I have had lots
 to worry about and often had to take doses to get
 some sleep. 1893 and 1903 worries were nothing com-
 pared to last month for reasons of so many credits
 being called and the inability to sell any of our

- 2320 Laager Huete. fr. 1,000,000 long bills on Dreyfus became due and we could not renew because D had left everyone draw on them and owing to D's son, depute talking against the railroads Medi and Orleans the two largest discounters of bills refused Dreyfus bills entirely, thereby hitting back at the father, head of the banking firm. It seems that Goldman Sachs & Company and J. Baschee & Company, Solomon & Company and others, not we, had drawn large amounts and the Paris market was full of Dreyfus and Hirsch bills. Dreyfus is quite willing to be drawn on by us—these drawings fcs. 2,000,000 in all are against C. C. C. stock for
- 2321 syndicate which we are carrying, half of it being our own which we got for the Denver South Western Coupon advance account. Flinch has seen Dreyfus in Paris and they have arranged only to be drawn on by us, so I hope the bills by others will not be renewed and there will be little Dreyfus in the Paris market.

To-day we were able to sell fcs. 500,000 90 d/s on them and Flinch has arranged for us to draw on Leu & Co. Zurich, fcs. 500,000. Heine will also discount fcs. 250,000 of bills for us, and the Basler Handelsbank will discount fcs. 250,000 against merchants bills receivable. These two latter F. has only cabled about so we must await their letters next week.

2322

Gillett has been at the office very little since he returned ten days ago, he is no better and very hard to talk to as he goes from one subject to another and cannot keep to the issue I am asking about. I have not showed him your letter yet as I expected if Clinch has a copy he would write me.

The Daimler is undoubtedly going to cause us a loss as the Co. was not fully insured by \$100,000 but we could not get any more insurance on it—as it was the \$308,000 was divided in 153 companies. Flinch is trying to get the parent house in Germany

interested—what the patents and stock are worth I ²³²³
do not know. Flinch may have his ideas so I wish
you would see him also about all other matters.

Pittsburg West Moreland earnings are poor, the
other day the road was struck by a cyclone and 3
bridges and part of the road bed was undermined by
the enormous rainfall. It will cost \$2,000 to repair
damage.

The loss on bonds ten points and stocks 15 to 20
points is also bad but may improve and the market
and feeling are much better.

MacLea account is very good. Milne Turnbull
account is not good, in fact they have run behind,
\$7,000. Shipley Blauvelt account and Orleans ²³²⁴
County Quarry are both good.

Daimler Pittsburg Westmoreland and Cripple
Creek Central which is so hard to carry are our
bates noires and the truth is that our condition is
not as good as it was end of last year and how
Gillett is to get out and we to get a new partner
unless you is a connundrum. Of course if Flinch
sells C. C. C. the 2 former will still trouble us.

Muskogee Gas and El. fine, earning \$30,000 above
6% div. on pfd.

Enclosed is a copy of my Cable. Loans payable
to-day are \$600,000, but with exception of \$180,000
are all saleable securities and a great many belong ²³²⁵
to other parties. Our interest account will be rotten
again this year and the more so because our ex-
change man MacLean thinks everything (losses)
ought to go on interest account and profits on ex-
change account.

Now dear Willy please do not worry as I am doing
that for the whole family, but don't fail to see Flinch
before he returns.

Best love to all.

Your Aff. Bro.

ALFRED.

Your——— bond we hold improved four points
to-day.

2326 **Receiver's Exhibit 61, Jan. 8/08,**
J. O. N.

17 Sept. 07.

DEAR FLINCH:

I have yours of 27th and 30 Aug., and 3, 5 and 6 Sept. The first was most interesting but needs no reply except "It would be well for Dreyfus to make known that his depute *did not* find fault with the railroads." You did well in Zurich with Len. Do they ever buy bonds or stocks. I think this a most propitious time to buy the former yielding $4\frac{1}{2}$ to 5% with a chance of a five point rise by spring and I have written to a lot of customers to this effect. A list of names to whom we wrote is enclosed. I have also offered \$200,000 Muskogee Gas 5's to a Glasgow firm at \$6 and int. Blackmer and Flynn letting me have them at \$5 and int. less 1 point. The earnings will show \$30,000 net for year after 6% on pref. stock. We only have \$27,000 bonds left, but I have not told this to Blackmer, as it would only be natural we should sell our own first, besides some time ago I told D we would sell ours first and he said, of course.

McLean is writing you about exchange. There will be lots of cotton bills and at lower prices than last year as guaranteed trust and Am. Express do not buy cotton bills any more.

Howard Taylor will communicate with Coudert. I gave him a copy of paragraph in your letter of Sept. 6th, pertaining to Bathmann. I only wish Hugo DeB. was as nice to deal with as Borgnis.

Gillett. I did not see Blackmer in regard to him, as G. has only been in the office twice since, yesterday and the 9th Sept. It is just as well, for he is a nuisance and in such times as these cannot possibly get the remaining B. W. & So. Bonds underwritten, but I take due note of how to treat him.

J. W. Baker died yesterday. The Hanover Bank people say he was quite well off, so I suppose we

shall lose nothing. After the funeral I shall go ²³²⁹ and see his friends. Brucher, of the T. C. I., and find out who his executor is and put in our claim. Evidently they know he knew me, for they called me up by phone and announced his death.

I have written Seymour he will have to pay off \$55,000 Orleans Quarry 8th Oct. whatever happens. If he cannot pay off the \$100,000 falling due 8th and 9th of Oct. It is still impossible to borrow money and Seymour knows it. I have advised him to sell bonds in ones and twos up State.

Best love to both of you,

Your sincerely,

ALFRED. ²³³⁰

**Receiver's Exhibit 62, Jan. 8/08,
J. O. N.**

Kessler & Co.

Bankers.

54 Wall Street,

New York, 23 Sept., 1907.

Messrs. KESSLER & Co., LIM.

Manchester.

DEAR SIRs:

In regard to your escrow for therecently drawn ²³³¹ £20,000, we beg to say we have withdrawn the two Orleans County Quarry, 2 notes for each \$10,000 and bonds as collateral \$20,000 and have replaced same by

200 shares com. Cripple Creek Cent.	
at 67	13,400
200 shares pfd. Cripple Creek Cent. at 67..	13,400

\$26,800

of which please take note.

Yours truly,

KESSLER & Co.

2332

**Receiver's Exhibit 63, Jan. 8/08,
J. O. N.**

27 Sept., '07.

DEAR RUDOLF:—

Thanks for yours 10th Sept., and I communicated contents re Daimler to Bouggy.

C. C. C. dividends were declared, books closed 11th Oct., payable 21 Oct. Of course you know the common was not fully earned and is taken from surplus. As I understand it the Co. earned net
\$263,000

from which must be deducted \$14,000 for
betterments, and \$14,000 Midland Ter-

2333

terminal Sink Fund	28,000
--------------------------	--------

\$235,000

Whereas dividends amount to \$270,000 for the year. They still have a surplus of \$96,000, but earnings are poor, not quite up to last year, and in case you place no stock in Europe we shall have to stop paying next Jan. dividends. Of course Blackmer is hoping you can sell and then Syndicate can take up C. C. C.'s Beaver Land Holdings, which will insure the dividends the next year and then the Tunnel will be finished, thereby insuring good business for some years to come.

2334

No one knows yet if Golden Cycle Cyanide plant is or is not to be re-built; anyhow no shipments are being made of the stock on hand, so naturally nothing is going to the U. G. plant, and the railroad freight is very light.

C. C. C. We are mailing you to-day circular letters of raise of interest. How about Schailer. Your father has not sent us the Mks. 100,000 so far.

Gillett is drawing small amounts and says he will need about \$3,000 before end of year—he maintains he made no agreement with you about drawing on us—for the last three weeks he has only been at our office Mondays.

We shall credit him 1 Oct. with int. on his Or-²³³⁵leans Quarry and P. W. & S. bonds, and he is trying to sell his Devlin claim to be paid to us.

We swapped to-day fks. 250,000 Dreyfus, with Monroe, and there remained fcs. 270,000 still unsold.

We are drawing fcs. 150,000 on Basler Handelsbank against \$15,000 MacLea and \$15,000 Orleans Quarry notes 10% margin.

The bears are attacking the market again and stocks are quite some lower, bonds are better and confidence has returned. The decline in copper metal and the Interborough Rapid Transit affairs are very upsetting. Then again a new stock issue²³³⁶ of \$35,000,000 for N. Y. & N. H. & H. and a \$30,000,000 equipment bond issue for N. Y. Central being talked of has made the bears very courageous.

Business is rotten all around, though the dry goods people like W. Iselen & Company Ad. Jouillard & Co. say they are doing a larger business this year than last, and they see no signs of any let-up.

I expect Henri Kessler to arrive 4th Oct. I hope you will be back before he returns.

\$140,000,000 will be divided up in dividends and interest 1 Oct. I think we shall get through the²³³⁷ year with 6% money. To-day call money rose to 5% from 3%, but it is preparatory to int. and div. payments on Tuesday next.

Kind regards,

Yours sincerely,

ALFRED KESSLER.

Park Bank had me up again about paying one-half of our loan, they have given me another month.

2338 **Receiver's Exhibit 64, Jan. 8/08,**
J. O. N.

Kessler & Co.
Bankers.

54 Wall Street,
New York, 2nd Oct., 1907.

Messrs. KESSLER & Co., LIM.
Manchester.

DEAR SIRs :—

We have again withdrawn from your £20,000
escrow \$8000 Note of the R. B. MacLea Co.

7000	do	do	
<hr/>			
15,000,	and have replaced same with		
166 shares	Cripple Creek pfd. at 67.....		\$11,122
100 shares	do com. do		6,700
			<hr/>
			17,882
			<hr/>

Please take note of this exchange.

Yours truly,

KESSLER & Co.

2340 **Receiver's Exhibit 65, Jan. 8/08,**
J. O. N.

Oct. 8, 7.

Messrs. KESSLER & Co., Manchester.

vomited Henri Kessler,
Philadelphia.

proverb We have arranged,
pyroasid balance,
Orleans.

voraginous R. E. F. Flinch
pere,

unifoliate should
help.

Receiver's Exhibit 66, Jan. 8/08, 2341
J. O. N.

8 Oct., '07.

DEAR RUDOLF:—

Yours of 26th Sept. to hand.

Gillett only appears at the office every Monday and has never touched again on the arbitration matter. Henri K. spoke to him yesterday and after his conversation (not business) came to me and said, Gillett is absolutely childish and evidently could not be depended on to do any work.

We have heard nothing from Disconto Gesellschaft, London, as yet.

2342

Gordon Macdonald was in just now, and as my friend, stated that comment had been made (not from Speyer sources) that you had been in Europe so long and that you had not visited the people in Germany, Berlin, we do business with. I told him you had had no intention of going to Berlin, and that you had been to see most of our bankers in Frankfurt, Zurich, Basel, London, Paris, Antwerp, etc.

He said, I don't know if the comment does come from Berlin, perhaps it comes from the very people he has seen, and perhaps, which in times like these is essential, he has not made any statement as to how K. & Co. stood. He says they are feeling nervous about us; but why, I don't know, as we owe so little in Germany. I thought it wise to mention this to you. It may be Dresner Bank or Disconto Gesellschaft, Berlin, but, of course, I cannot guess. I told Gordon you really went for a holiday, but had attended to business more or less, and that you had not been well.

2343

Yesterday we got your and Willie's cable to Henri, who could give me no advice and went to Philadelphia. The cable read "Flinch here 12 A. M., their position not at all satisfactory, please consult

2344 A. K., would advise selling stocks, are trying here arrange loan against Orleans, Cripple Creek success doubtful. Do not approve of more Manchester. What is best that can be done."

This last sentence is the great conundrum which cannot be solved.

To-day I cabled "Henri Kessler, Philadelphia, we have arranged balance Orleans, Flinch's father should help."

Merchant's bank will discount the \$45,000 Orleans Quarry notes, and we previously received your cable from Paris "We have arranged Ruffer will accept drafts drawn by Orleans about £11,500 under

2345 your guarantee, same collaterals, P. W. K. expect arrange cash loan against Cripple Orleans, send them full particulars. Orleans."

I write Manchester at once giving them all I could tell about Orleans.

Seymour says he will be able to pay \$25,000 or \$30,000 end of next week, but I doubt it. The legal decision was postponed until 24th Oct. (Chiefly because the Orleans lawyer was not ready), which made me very mad.

Herklotz case comes up in Albany end of this month.

2346 United Breweries *must* have 28th Oct. \$20,000 90 days, \$20,000 105 days, \$20,000 120 days, total \$60,000. I saw the Corn Exchange Bank, and they may take them with our endorsement. I do not go to ask our banks, as it would simply cut off our line of discount by so much. Baumgartel is very sanguine, and says in two months he is going to try to boost the price of beer again.

The U. B. are in the market for \$35,000 worth of bonds, and expect to pay 55 for them, and are open to offerings. This would mean a cancellation of 63 bonds. They sold some property lately.

I sincerely hope you are able to fix up the Daimler and sell some C. C. C. Money is expected to be much

easier here after the 15th Nov. There are lots of ²³⁴⁷ cotton mills, but exchange remains firm, as bankers are putting out few large bills and the American public is said to have spent \$200,000,000 in Europe this year.

We still have Fcs. 770,000 Dreyfus to sell.

Don't forget to cable a little before you sail, so as to avoid these long letters. I suppose you will be back to take up Gillett matter, as you can manage him much better than I.

Kind regards; yours sincerely,

ALFRED.

Receiver's Exhibit 67, Jan. 8, 08,
J. O. N.

2348

11TH OCT., '07.

MY DEAR WILLY:—

I had Henri and wife at lunch Monday but did not get any business talk with H. as they were off for Philadelphia. They are going to stay next week at Atlantic City and return here 21 of Oct.

K. & Co. Lim. letter of 2 Oct. states our drafts 20,000 90 d/s order W. L. S. Jackson & Co. are due 1 Jan., 1908. Please make this 31 Dec. so as we will cover before you close your books.

2349

I received your letters of 4 and 25 Sept.

United Brewery bonds are unsalable, in fact all bonds are except the active ones on the stock exchange and those suitable for savings banks (of which we have none). The earnings for Aug. were very good, \$41,000 net after fixed charges and they say after 1 Nov. they say they expect to boost the price of beer. The bonds are absolutely good and situation is much improved. A company is trying to buy \$35,000 of bonds as cheaply as possible and cancel them, which being money received by sale of some real estate. They think they can buy

2350 some bonds at 60 but I doubt it if the holder knows anything about earnings. The output of the finer bottled beer is increasing and there is quite a profit in it.

Gillett only appears here Mondays, and of course is unable to do anything in P. West & S.

MacLea and Milne we pay duties and the manufacturers and also advance them money for running expenses. Unluckily they both have too much stock on hand which happens when they miss the market such as last June when it was so cold and the purchasers refused to take the goods off their although they had been sold. Milne and Turnbull
2351 have a meatbag account, sell to Armour, Swift, Hammond, etc., payable 30 days; we pay manufacturers in ten days. We get 6% int. and $2\frac{1}{2}\%$ commission, they make 20% and the account is growing very much. I figure this account will pull as straight with them. MacLea runs very smoothly so does Shipley & Blauvelt. Orleans Quarry runs O. K. and is a good account.

In answer to your cable to Henri I cabled as per copy enclosed. Flinch kept promising his father would send \$20,000 but he never did. I wrote a long letter last mail, but what to answer to the last words in your cable, "what is best that
2352 can be done," I am sure I cannot say. Stocks are so low now I hate to sell and the best houses have many more buying orders than selling orders. I must finish this next mail or I will miss my train.

Best love,

ALFRED.

Receiver's Exhibit 68, Jan. 8/08, 2353
J. O. N.

17 Oct., '07.

DEAR WILLY:—

Arbitration between us and Gillett has been postponed from 25th Oct. until 15 Nov. as Flinch will have to be present. Please you also impress on him he will have to be present, as he has all the evidence and correspondence and the lawyer says I could not act for him. Gillett looks very feeble and I hope he does not die before the arbitration, it is always harder to deal with estates. Curious I have named Howard Taylor and Gillett 2354 James Byrne, as arbitrators. These two were formerly partners and are great friends, so I expect a third arbitrator will not be necessary. I only hope Flinch is not as sick a man as you make him out to be. Rudolf Kissell would never join me as long as Flinch is my partner and Theodore Price is none too flush at present unless cotton drops to 8 cents. He is a great bear on cotton.

Westmoreland. \$67,000 has still to be paid for rails and there may be 5 or 6 thousand or more needed for equipment. The Oct. 1 bond interest was paid O. K. but I doubt if winter earnings will be sufficient for April Coupon. In summer they 2355 can earn the interest all right and as the road gets older the more traffic they will get.

Yours of 8th and 9th Oct. also received. No bonds are saleable so Birdie could not do anything, see enclosed cutting. I believe Herman Kinne-cutt is also tied up but I think the securities are better to borrow on than ours. Henri returns Monday.

Dreyfus are all right in themselves, at least the credit Lyonnais admit they have been very successful and are rich. However they do not want their long bills for discount.

2356 Stock market continues in a very nervous state. Amalgamated div. was cut in half to-day and Otto Heinze & Co. failed. The buying was very good and the public are at last entering the market cautiously. I expect easier money a month hence and bonds ought to improve.

Could you sell any Muskogee Gas & Electric bonds for us 5% first mortgage and refunding at say 87½ and int. we could allow you one per cent on this price and they are perfectly good. If you can I will send you all particulars. Say if you want them. Muskogee is in Indian Territory and is growing very fast like Oklahoma City.

2357 18th Oct. The mercantile National Bank of which Heinze was president has been taken over by other banks and all of the directors have resigned. The bank had deposits of \$12,000,000.

I translated your cable to Henri and sent it to him at Atlantic City. Gillett was not down to-day nor was he yesterday. Standard Oil crowd have been large buyers of stock for three days in a falling market. We sold fs. 520,000 on Dreyfus to-day but is very difficult.

Henri writes he will only return here Tuesday. I asked him to make it Monday as I have to be in town Monday night. Flinch's Daimler letter arrived to-day—it is not very satisfactory but Bougy president of B. M. Co. here will go over it with me Monday. His opinion will be better than mine. Business outside of stock exchange is very dead. Best love to all.

2358

Your Aff. Bro.,

ALFRED.

Receiver's Exhibit 69, Jan. 8/08, 2359
J. O. N.

KESSLER & Co.

54 Wall Street,
NEW YORK, 25th Oct., 1907.

Messrs. KESSLER & Co., LIM.
Manchester.

DEAR SIR:—

We handed Mr. Henry Kessler to-day your two
escrows as per list enclosed, please cancel old list.
You will notice we have put Daimler pfd in your
escrow in place of common. We think eventually
we ought to get something for the common stock 2360
too.

Mr. Henry Kessler took a separate vault box
for these escrows and Mr. Albert Kessler, Otto
G. Kessler and North McLean have access to same.
The box is in name of K. & C. Lim, Manchester,
No. 2097.

Yours truly,
KESSLER & Co.

2362 **Receiver's Exhibit 70, Jan. 8/08,**
J. O. N.

ESCROW KESSLER & Co. LD., Manchester.

	2428 sh. United Lighting & Heat....	10	\$24,280.—
	1606 " " in Manchester	10	16,060.—
	1341 " Daimler Mfg. Co., pfd.....	100	134,100.—
	\$56,000 United Breweries 1st M. 6's.	80	44,800.—
	50,000 " Notes....		50,000.—
	1000 sh. Underground El. Ldn. }		
	full paid		
	2000 sh. Underground El. Ldn. }		49,663.13
	Beneficial Cert.....		
2363	70 sh. Standard Roller Bearing \$50		
	share	60	4,200.—
	100 sh. Standard Roller pfd.....	50	5,000.—
	10,000 sh. Elkton Mining Co.....	50	5,000.—
	500 Sh. U. S. Red. & Ref. Co. pfd..	25	12,500.—
	1,000 " " com...	10	10,000.—
	\$45,000 Pittsburg, Westmoreland &		
	Som. 1st 5's	95	42,750.—
	12,000 Ind. Col. & East Tract 1st..	90	10,800.—
	288 sh. Muskogee, Gas & Elect. Com.	20	5,760.—
	288 " " pfd.....	60	17,280.—
	\$22,000 " " Refdg.	87	19,140.—
	Bedford Avenue property.....		31,000.—
2364	Western Pacific Syn. rect.....		7,234.38
	548 sh. Chicago Gt. Westn. Pfdg. B.	10	5,480.—
	\$20,000 Orleans County Quarry Co.		
	1st	90	18,000.—
			<hr/>
			\$513,047.41

Receiver's Exhibit 71, Jan. 8/08, 2365
J. O. N.

KESSLER U. Co. LTD. Special Escrow.

£20,000, 60d/s

\$25,000 Orleans County Quarry..... \$22,500

Note, Milne Turnbull & Co. due Nov. 11.. 16,000

" " Dec. 27.. 7,000

" " Dec. 27.. 27,000

Note R. B. MacLea Co. due Dec. 5..... 5,000

300 shares, Cripple Creek Com. 67..... 20,100

466 " " pref. 67..... 31,222

\$118,822 2366

NEW YORK, February 1, 1908,
 10 A. M.

Met pursuant to adjournment.

Present—Mr. LARKIN, for the Trustee.

Mr. ELKUS and Mr. McLAUGHLIN, for Kessler
 & Company, Limited.

Mr. Elkus: I offer in evidence the copies of
 drafts drawn on Kessler & Company of Man-
 chester, by Kessler & Company, of New York, on 2367
 September 16th, 1907, for 2,500 Pounds—six
 separate drafts, each for 2,500 Pounds, each dated
 the same day, each drawn ninety days after sight,
 and numbered 202,836 to 202,841, inclusive, the
 aggregate being 15,000 Pounds, with the ac-
 ceptances and endorsements.

Received in evidence and marked Kessler &
 Company, Limited, Exhibit F F.

Mr. Elkus: I offer in evidence Notarially cer-
 tified copies of the protests of each.

Mr. Larkin: I object to the protests on the

2368 ground they are insufficient and not in the form required by law, and are therefore incompetent proof and no proof as to the fact of the protest. I just want to interpose that objection now and leave it to the Court to decide later on.

The Special Commissioner: Yes, I will overrule your objection for the present and take them subject to your objection later on.

Received in evidence and marked Kessler & Company, Limited, Exhibit G G.

Mr. Elkus: I offer in evidence drafts numbers 202,828 and 202,829, for 5,000 Pounds each, 2369 dated September 17th, 1907, accepted December 25th, 1907, and held by John Munroe & Company.

Received in evidence and marked Kessler & Company, Limited, Exhibit H H.

Mr. Elkus: I offer in evidence the notarially certified copies of those.

The Special Commissioner: Yes, we will take the copies.

Mr. Elkus: And I offer in evidence the protests of the same.

Mr. Larkin: I make the same objection to those protests as I have to the others. 2370

Same ruling.

Received in evidence and marked Kessler & Company, Limited, Exhibit J J.

Mr. Larkin: The same objection is made, I understand, to each and every one of the certificates of protest?

The Special Commissioner: Yes.

Mr. Elkus: I also offer in evidence certified copies of the drafts drawn by Kessler & Company of New York on Kessler & Company of Manchester, dated September 24, 1907, numbers 202,965 to 202,968, inclusive, each for 5,000 Pounds,

the total being 20,000 Pounds, payable 90 days 2371
after sight, and accepted December 31, 1907.

Received in evidence and marked Kessler
& Company, Limited, Exhibit K K.

It is conceded that on October 14th, 1907, Kessler
& Company of New York drew on Kessler & Com-
pany of Manchester a draft No. 203,257, for 152
Pounds, 7 Shillings and 9 Pence, payable 60 days
after sight, which draft was accepted on or about
October 21, 1907, by Kessler & Company, Man-
chester, England. Said draft was protested for
non payment in the same manner as the other
drafts which have been offered in evidence have
been protested. 2372

Mr. Larkin: I make the same objection as to the
protest, and I would like to verify the dates; that
is, subject to correction as to dates.

The Special Commissioner: Yes, the same rul-
ing.

Mr. Elkus: I offer in evidence original drafts
drawn by Kessler & Company, dated September
16th, 1907, each for 5,000 Pounds, on Kessler &
Company of Manchester, 90 days after sight, pay-
able to the order of John Munroe & Company,
Nos. 202,828 and 202,829, and the original protests
attached thereto and accepted by Kessler & Com-
pany of Manchester. 2373

Mr. Larkin: I make the same objection to the
protests.

The Special Commissioner: The same ruling.

Received in evidence and marked Kessler
& Company, Limited, Exhibit L L.

RUDOLPH E. F. FLINSCH (Resumed):

CROSS-EXAMINATION BY MR. ELKUS:

Q. Were you in London in the year 1903 in June?

A. Yes, sir.

2374 Q. And did you meet Mr. Alfred Kessler there?

A. Yes, sir.

Q. Did you have any conversation with him with reference to Kessler & Company of Manchester? A. Yes, sir.

Q. What was the conversation?

Mr. Larkin: I object to that on the ground it is incompetent, immaterial and irrelevant and has nothing to do with this issue, incompetent proof.

Objection sustained. Exception.

2375 Q. Did you have any conversation with Alfred Kessler with reference to what arrangement he had made with Kessler & Company of Manchester as to the deposits of securities for their benefit?

Same objection. Same ruling. Exception.

Q. Did or did not Alfred Kessler state to you at that time, in London, what arrangement had been made by him and what had taken place between himself and Kessler & Company of Manchester, England, with reference to the deposit of securities?

Same objection. Same ruling. Exception.

2376 Q. Did you, after you met Alfred Kessler in London, have any talk with any director of Kessler & Company of Manchester? A. Yes, sir.

Q. When was that? A. The day after I had had my first talk with Alfred Kessler.

Q. That is, in June, 1903? A. Yes, sir.

Q. With whom did you have any conversation in Manchester? A. In London, with Mr. P. W. Kessler.

Q. That is Philip William Kessler? A. P. W. Kessler, yes.

Q. What conversation did you have with him?

Mr. Larkin: I object to that.

The Special Commissioner: Objection sustained.

Mr. Elkus: Exception.

2377

Q. Mr. Flinsch, did you talk with P. W. Kessler with reference to the conversation that you had had with Alfred on the previous day?

Mr. Larkin: I object to that.

Same ruling. Exception.

Q. Did your conversation with P. W. Kessler relate to the deposit of securities for Kessler & Company of Manchester and your holding the same as agents for them?

Same objection. Same ruling. Exception.

Q. Please state such conversation in full?

2378

Same objection. Same ruling. Exception.

Mr. Elkus: I want to state on the record that I propose to prove by the two conversations that Kessler & Company of New York agreed to hold the securities as agents for Kessler & Company of Manchester, and that, in that respect, the purpose of this proof, or offer of proof is to supplement and add to the agreement as set forth in the letter of June 30th, and the replies thereto and the matters of correspondence.

The Special Commissioner: You must put your questions. I cannot entertain that.

Q. Was anything said by Alfred Kessler to you when you met him in London in June, 1903, with reference to the firm of Kessler & Company of New York, of which you were a member, holding any securities for Kessler & Company of Manchester, England?

2379

Mr. Elkus: I object to that on the same grounds.

Same ruling. Exception.

Q. Was anything said at that time between you and Alfred Kessler or by Alfred Kessler to you with reference to the capacity in which your firm of

2380 Kessler & Company of New York were to hold such securities?

Same objection. Same ruling. Exception.

Q. Did or did not Alfred Kessler say to you, in words or substance, at that interview, that he had agreed and stated to Kessler & Company of Manchester or their representative that certain securities were to be set aside and held by Kessler & Company, your firm, as agents for Kessler & Company of Manchester?

Same objection. Same ruling. Exception.

2381 Q. When you saw P. W. Kessler the following day in London, after having seen Alfred Kessler, did you or did you not state to P. W. Kessler the conversation you had had with Alfred Kessler?

Same objection. Same ruling. Exception.

Q. Did you or did you not state to P. W. Kessler, in words or in substance, that certain securities would be set aside to be held by Kessler & Company of New York as agents for Kessler & Company of Manchester, England?

Same objection. Same ruling. Exception.

2382 Q. State in full the conversation, if any, that you had with P. W. Kessler in June, 1903, with reference to the deposit of securities by Kessler & Company of New York for Kessler & Company of Manchester.

Same objection. Same ruling. Exception.

Q. State whether or not, when you talked with P. W. Kessler in London, England, in June, 1903, anything was said as to how you were to hold any securities for them—Kessler & Company of Manchester, England?

Same objection. Same ruling. Exception.

Q. State whether or not, in your interview with P. W. Kessler in London, England, in June, 1903,

you stated to him that Kessler & Company of New York would hold securities and set aside for Kessler & Company of Manchester, as agents for Kessler & Company of Manchester? 2383

Same objection. Same ruling. Exception.

Q. On June 30th, 1903, you wrote a letter, which has been marked "Kessler & Company, Limited, Exhibit B, of December 2nd, 1907," in this proceeding. Does this copy which I show you now refresh your recollection? A. Yes, sir.

Q. In this letter—you had returned to New York after your interview with Alfred Kessler in London? A. Yes, sir.

Q. And after you got back you wrote that letter? 2384
A. Yes, sir.

Q. I call your attention in this letter that it begins with the words "In accordance with instructions from Mr. Alfred Kessler." What instructions did you receive?

Mr. Larkin: I object to that on the ground the witness has already testified that those instructions were in writing.

Q. What instructions did you receive from Alfred Kessler, which are referred to in this letter?

Mr. Larkin: I object to that, if they are in writing, as they are.

2385

Q. Are they in writing?

The Special Commissioner: If they are in writing, I sustain the objection.

Mr. Larkin: He has already testified they were in writing in his testimony.

The Witness: I did not get them, if I said so.

Q. Did you get any written instructions from Alfred Kessler? A. No, sir.

Q. Where were you when you received instructions from Alfred Kessler? A. In London.

Q. In London, in June, 1903? A. Yes, sir.

2386 Q. What instructions had you received?

Mr. Larkin: I make the same objection. It is immaterial what instructions Alfred Kessler gave him.

The Special Commissioner: Objection sustained.

Mr. Elkus: Exception.

Q. Mr. Flinsch, does the letter of June 30th, 1903, set forth the entire arrangement that was made between your firm and Kessler & Company of Manchester, England?

Same objection. Same ruling. Exception.

2387 Q. Was or was not part of the agreement as to the deposit of securities between your firm and Kessler & Company of Manchester orally arranged between your partner and yourself and a director of Kessler & Company of Manchester?

Mr. Larkin: I make the same objection.

Same ruling. Exception.

Q. Was there any other agreement besides that set forth, or pretended to be set forth, in the letter of June 30th, 1903, between your firm and Kessler & Company, Limited, of Manchester, England, as to the deposit of securities?

Same objection. Same ruling. Exception.

2388

Q. Did you have any conversation with any representative or officer or director of Kessler & Company of Manchester with reference to the deposit of securities, and was any agreement made between you or your firm and Kessler & Company of Manchester in addition or supplementary to the letter of June 30th, 1903?

Same objection. Same ruling. Exception.

Q. I notice in your letter that you say you have "To-day placed in a separate package in our safe deposit vaults the following securities—package

marked 'Escrow' for account of Kessler & Company²³⁸⁹
Escrow." What did "Escrow" mean?

Mr. Larkin: I object to that.

Objection sustained. Exception.

Q. What did you mean when you used the word
"Escrow" in that letter?

Mr. Larkin: I object to what he meant.

The Special Commissioner: Yes, I think that is
objectionable.

Mr. Elkus: Exception.

Q. You say in your letter "This escrow is in-
tended as a protection against our long drawings²³⁹⁰
against your good selves." Will you tell the Ref-
eree what you meant by the word "protection"?

Mr. Larkin: I object to that.

Objection sustained. Exception.

Q. In order to protect Kessler & Company of
Manchester, was your agreement with them, and
did you intend to so specify in this letter, that you
were to hold the securities as agents for them?

Mr. Larkin: I object to that on the same grounds.

Same ruling. Exception.

Q. In what way were you to protect Kessler &
Company of Manchester?²³⁹¹

Same objection. Same ruling. Exception.

Q. Did you have any conversation with any di-
rector or officer of Kessler & Company of Man-
chester with reference to protecting them, as speci-
fied in this letter of June 30th, 1903?

Same objection. Same ruling. Exception.

Q. Did you have such conversation with refer-
ence to the manner of protecting them after June
30th, 1903, or on or about that date did you set
aside in a separate package, in your safe deposit
vaults, the securities mentioned in your letter?

2392 Mr. Larkin: I object to that.

Q. Do you know it had been done—whether you did it or not? A. I know it was done.

Q. Did you see them after they were wrapped up? A. No, sir.

Q. You gave directions to have it done? A. Yes, sir.

Q. And did you then hold the securities as agents for Kessler & Company of Manchester?

Same objection. Same ruling. Exception.

Q. How did you then thereafter hold the securities.

2393 Same objection. Same ruling. Exception.

Q. Do you remember P. W. Kessler being in this country in the fall of 1906? A. Yes, sir.

Q. Did you have any conversation with him? A. Yes, sir.

Q. With reference to any securities? A. Yes, sir.

Q. Was the conversation with reference to the securities then held by you for Kessler & Company of Manchester?

2394 Mr. Larkin: I object to that, if the Court pleases, on the same grounds. I think it is leading. He calls the attention of the witness, and in the question, in a certain sense, defines or tries to describe the character of his holding, and I think the question is objectionable on that ground.

The Special Commissioner: I think the form of your question does imply that.

Q. Did you have any conversation with P. W. Kessler at that time with reference to the securities held in the escrow? A. Yes, sir.

Q. What was the conversation?

Mr. Larkin: I object to it on the ground that it is incompetent, immaterial and irrelevant; that any conversation that they may have had could

not change the arrangement that was made on June 2395
30th, 1903.

The Special Commissioner: I will allow the
question and give you an exception and give you
permission to move to strike it out.

Mr. Larkin: Please fix the date, Mr. Flinsch.

Q. If you can't fix the date, fix the month. A. It
must have been between the 15th and 25th of No-
vember, 1906.

Q. Were you ill at the time? A. I was.

Q. Where was the conversation? A. At Hunt-
ington, Long Island.

By the Special Commissioner:

2396

Q. Were you living there? A. We were living
down there that summer.

Q. And that Fall? A. Yes, sir.

Q. At your house this was? A. We had rented
a cottage there.

Q. Who else was present besides P. William Kess-
ler? A. Mr. Alfred Kessler. Both of them came
down there to see me.

By Mr. Elkus:

Q. What was the conversation between P. W.
Kessler and yourself?

2397

Mr. Larkin: I make the same objection.

The Special Commissioner: I will allow it and
you may have an exception, and you may have an
opportunity to move to strike it out.

The Witness: All I remember about it is that
P. W. Kessler said to me "I have been down at the
vault checking over our securities."

Q. P. W. Kessler had come from New York to
see you? A. Yes, sir.

Q. He had come from London some time pre-
vious to New York and had been staying there?

A. Well, I believe so, yes.

2398 Q. Mr. Flinsch, you were asked some questions about a talk with Mr. Burgnis about the settlement of some litigation? A. Yes.

Q. You were asked whether you stated to Mr. Burgnis that if a judgment was entered against you it would hurt your credit here. Do you remember making any such statement to him? A. I think substantially, yes; I stated to him I did not like the idea of having such a judgment entered against the firm in times as critical as the present.

By the Special Commissioner:

Q. And what date was that? A. In the autumn
2399 of 1907.

Q. That would be September, October and November. What part of the autumn? A. October, 1907.

Q. How long before you sailed? A. A few days before I sailed.

Q. Does that mean a week? A. About that.

Q. And when did you sail? A. The 29th of October.

By Mr. Elkus:

Q. That was just about a week before you sailed?
A. Yes.

2400 Q. That conversation, when you stated that to him, did you have in mind that the entry of a judgment might cause your failure or suspension?
A. No, sir.

Q. Or cause your insolvency? A. No, sir.

REDIRECT-EXAMINATION BY MR. LARKIN:

Q. Didn't you, in one of your letters to Mr. Alfred Kessler, and about this time, state that if you tried to get money in Frankfort that it would be all over Frankfort that Kessler & Company were in financial difficulties? A. Well, I think—

Mr. Elkus: I think if there was such a statement 2401
that the letter should be shown to him.

The Special Commissioner: Is it there?

Mr. Larkin: Yes, sir.

The Special Commissioner: Well, you had better
show him the letter.

Q. Mr. Flinsch, I call your attention to a letter
written by you on the 9th of August, 1907.

The Special Commissioner: What is the exhibit?

Mr. Larkin: It is marked——

Mr. Elkus: We haven't any objection to Mr.
Flinsch reading that letter.

Q. I call your attention to a letter written August 2402
9th, written by you to Alfred Kessler. In the
last paragraph you say "Am convinced now that
if I try to get F. & Co. to borrow on C C C as at
first contemplated, it will be all over Frankfort
in no time that K. & Co. in New York are hard
pressed, because the banks here have nothing to
do but gossip, and they will put two and two to-
gether very quickly, when they have C C C offered
as collateral. Am now writing to Willy." Now,
in view of that statement, Mr. Flinsch, do you
wish to state that the entry of a judgment against
you of a substantial amount by Mr. Burgnis might
not have precipitated your failure and insolvency? 2403
A. I did not make such a statement.

Q. I didn't ask you whether you did. I asked
you whether or not you did not believe that if a
judgment was entered against you it might precipi-
tate your failure? A. I didn't believe so.

Q. What you wrote over to Alfred Kessler was
correct—in your judgment that Frankfort would
believe that Kessler & Company of New York were
hard pressed? A. Yes, sir.

Q. Why did you believe that Frankfort would
believe that Kessler & Company were hard pressed

2404 because they were putting up Cripple Creek Stock
as collateral?

Mr. Elkus: I object to that as calling for the witness's conclusion.

The Witness: Being hard pressed does not mean being insolvent.

Q. Well, what is the next stage between being hard pressed and insolvency, as you define it?

Mr. Elkus: I object to that.

Objection sustained.

Q. While you were over there and spending a
2405 good deal of your time, didn't you endeavor to have your relatives pay up their indebtedness to the concern? A. Yes, sir.

Q. Mr. Flinsch, what was the extent of the investment of Kessler & Company in the Daimler Company—six hundred and some thousand dollars—I mean directly and indirectly? A. As loans and as advances, loans to various accounts?

Q. Yes. A. Yes, I think so—about \$600,000—variously secured.

Q. Now, the way you made these loans was that you got Mr. Bouggy or somebody else to make a note for the amount, for the advance which Kessler & Company may have made, and then that note
2406 was secured by stock or bonds of the Daimler Company? A. Or by merchandise, yes.

Q. You mean automobiles manufactured by the Daimler Company? A. Yes.

Q. Now, the Daimler Company—had it paid any dividends?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant.

The Special Commissioner: I will allow the question.

Mr. Elkus: Exception.

The Witness: No, sir.

Q. The plant of the Daimler concern at Long Island City had been burned down? A. On February 15th. 2407

Q. You had collected all the insurance? A. Nearly all of it.

Q. To the amount of \$300,000? A. Yes.

Q. And with that you had liquidated to that extent moneys due from the Daimler Company to Kessler & Company? A. To the extent of about \$220,000.

Q. And the balance was a floating debt? A. Of the company—not to us, to Kessler & Company.

Q. What office had you in the Daimler Company? A. I was not an officer. 2408

Q. Was Bertie Kessler an officer? A. No, sir.

Q. Well, Nestle was?

Mr. Elkus: I object to that as incompetent, immaterial and irrelevant.

Objection overruled. Exception.

A. Yes, sir.

Q. And Mr. Bouggy—he appears in this account as a debtor. Wasn't he a manager of that concern? A. Yes, sir. That was a memorandum account, though. It really concerned the company itself.

Q. It was simply a name? A. Yes. 2409

Q. And he was really acting for the Daimler Company? A. The notes were made out by the Daimler Company, yes.

Q. It wasn't any personal claim against him? A. No, sir.

Q. After this concern had burned down, there was some real estate left in Long Island. Do you know how much? A. Yes, sir.

Q. How many lots? A. I don't know the number of lots. I should think the value of—

Q. Never mind the value. A. Well, now—

2410 By the Special Commissioner :

Q. About how many lots? A. I don't know exactly.

Q. How many lots did you sell? A. I didn't sell any lots.

Q. Don't you remember writing to Alfred Kessler authorizing him to sell some of the lots?

Mr. Elkus: I object to that unless he shows him the letter.

By the Special Commissioner :

Q. Does it refresh your recollection? A. I didn't sell any lots.

2411 Q. Did Mr. Alfred Kessler? A. Yes, inquired whether the company could accept a certain figure, five or \$8,000, for a few of the lots which they owned out in Long Island City.

Q. They inquired of you? A. They asked me whether I approved of it.

Q. By letter? A. I think by cable, and my reply was that I approved it.

By Mr. Larkin :

Q. You approved the sale? A. Yes, but they declined it.

2412 Q. And the lots were not sold? A. They could make the sale, but they didn't want to make it, because they thought it wasn't good enough.

Q. Is that the time you wrote them to sell the machines at any decent or indecent price? A. Yes, sir.

Q. You don't know how many lots you had over in Long Island? A. About 30 or 40, I believe; maybe more.

Q. Maybe more? A. Yes, sir.

Q. Does anybody know how many lots you had? A. I could look it up.

Q. You could look it up? A. Certainly.

Q. Those lots were mortgaged, weren't they? A. 2413
No, sir.

Q. There was no mortgage on them? A. Well, there may be now. I didn't know anything about that. They weren't mortgaged at that time.

Q. You had some lots in Bayonne? A. No, they had a mortgage on property they had sold in Bayonne, in the middle part of 1897.

Q. And they had a mortgage representing the purchase price? A. Yes.

Q. What is the amount of the mortgage?

By Mr. Elkus:

Q. The entire purchase price? A. They made a 2414
profit on the sale and had \$32,500.

By Mr. Larkin:

Q. And did they turn over that mortgage to you for the \$32,000? A. They pledged that mortgage to secure certain of these advances.

Q. What became of the cash derived from that sale? A. That went into the Daimler company as a profit.

Q. Besides the Astoria lots and the Bayonne lots, which you sold, what other real estate did the Daimler Company own? A. No other real estate. 2415

Mr. Elkus: I object to this as incompetent, immaterial and irrelevant—an examination into the affairs of the Daimler Company.

No ruling.

Q. Did the Daimler Company own any other real estate? A. No, sir.

Q. The company now, I understand, owns no other real estate than the pieces you have described, so far as you recollect? A. Yes.

Q. They didn't own any other property than the Astoria property. A. No, as far as I know.

2416 Q. Any real property? A. Yes.

Q. Do you know how many automobiles they had unsold in October? A. Eight or ten, I believe.

Mr. Elkus: I object to all this, as going into an examination of the affairs of this company. I do not think it is in any way material.

Objection overruled. Exception.

Q. When you say you believe, do you know anything about it? A. I was not here.

Q. You were kept in touch with the Daimler affairs? Your letters relate, every letter relates to the Daimler Company in some connection?

2417 Mr. Elkus: I object to that as characterizing his letters. They speak for themselves, and if Mr. Flinsch does not know, he ought to produce somebody who does know.

Q. Of course, Mr. Nestle was perhaps more familiar with the details of the Daimler Company's affairs when you were abroad than you were?

Mr. Elkus: I object to that. How does he know what Nestle knows?

The Special Commissioner: Well, he had opportunity to know. Put your question in that form.

Q. Mr. Nestle, you know, is not here? A. No, sir.

2418 Q. Aside from the real estate which you spoke about and the automobiles which you have testified to, the assets about which the Daimler Company was most concerned was a contract, wasn't it?

Mr. Elkus: I object to it as permitting this witness to characterize something as an asset which he ought not to. It is incompetent, immaterial and irrelevant and calls for the conclusion of the witness.

The Special Commissioner: Objection sustained.

Q. What other property has the Daimler Company besides the automobiles and the real estate you have referred to?

Mr. Elkus: I object to that as incompetent, im- 2419
material and irrelevant.

The Special Commissioner: Objection overruled.

Mr. Elkus: I take an exception.

The Witness: In October, 1897?

Q. Yes. A. That is what I subsequently found
out.

Mr. Elkus: If you do not know, why, say so.

The Witness: They had, to my knowledge.

Mr. Elkus: I object, if he did not know at the
time.

By the Special Commissioner:

3420

Q. When did you arrive here? A. November 5th.

The Special Commissioner: Perhaps he knew
then.

By Mr. Larkin:

Q. At any time that you knew anything about
Daimler assets, please tell us, aside from these au-
tomobiles and real estate and the cash derived from
the sale of real estate. I want to know what other
property the Daimler Company owned?

Mr. Elkus: I object to that as incompetent, im- 2421
material and irrelevant. November 5th is too re-
mote in point of time, and the witness should only
be allowed to tell what he knows of his own knowl-
edge and not what he heard from others. It is
utterly incompetent.

The Special Commissioner: You want to state
what you knew of your own knowledge, of course.

The Witness: Besides the real estate and mort-
gages which the company owned, they owned build-
ings, machinery, materials, supplies, furniture and
so on, not to amount to a great deal.

2422 By the Special Commissioner:

Q. That means office furniture? A. That mean office furniture and so on and various contracts.

By Mr. Larkin:

Q. Mr. Flinsch, the machinery that you refer to was over at Astoria? A. Yes, sir.

Q. And was machinery used to make automobiles, just like any other manufacturing plant? A. Yes, sir, certainly.

Q. These buildings were destroyed, or some part of them, were they not, by fire? A. Yes, a large
2423 part of them were destroyed.

Q. And the machinery in them? A. Yes.

Q. They have never been restored? A. No.

Q. And a part of the automobiles were destroyed by fire as well? A. Yes.

Q. So that after the fire, there were but four or five automobiles left? A. After the fire I think 18 were left.

Q. Are you sure there was 18? A. To the best of my knowledge, yes.

Q. The plant was never rebuilt? A. No, sir, it was not.

Q. And the Daimler Company owned some contracts, I think? A. Yes, besides the buildings and
2424 other things that I mentioned.

Q. This contract that you refer to was a right to build automobiles upon certain lines, wasn't it?

Mr. Elkus: I object to that. The contract was in writing and it speaks for itself.

The Witness: There were several contracts, Mr. Larkin.

By Mr. Elkus:

Q. Were they all in writing? A. Yes, sir.

By Mr. Larkin:

2425

Q. There were several contracts, but they are all of the same nature? A. No, they were different kinds.

Mr. Elkus: I object to the characterization.

No ruling.

Q. You had contracts which gave the Daimler Company a right to manufacture automobiles?

Mr. Elkus: I object to that. If the contract was in writing, it speaks for itself.

The Witness: That was one contract, yes, sir.

Mr. Elkus: I object to a contract that is in writing being characterized by any witness or its pur- 2426
port being stated, and as incompetent, immaterial and irrelevant.

By the Special Commissioner:

Q. Who has these contracts? A. These contracts between the parent concern with the Daimler Manufacturing Company here?

Q. That was one of them? A. Yes, sir.

Q. And what was the other one? A. The other one was a license contract between the Daimler Company here and one of the agents here for the importation of automobiles into this country.

Q. What were the other contracts? A. Those 2427
were the two chief contracts.

By Mr. Larkin:

Q. One was the right to manufacture and the other giving them a right to sell?

Mr. Elkus: I object to that. That is giving the contents of a written instrument.

By the Special Commissioner:

Q. Where are the contracts? A. They must be in the hands of the Daimler Manufacturing Company.

2428 Q. Here? A. Yes.

Q. Who is the officer here of the Daimler Manufacturing Company? A. The president is C. M. Bouggy.

Q. Is he here in New York? A. He left I think, for the West on Friday.

Q. Is there any other officer? A. Mr. Alfred Kessler is the treasurer of the company.

Q. You are not an officer of the company? A. No, sir; I am a director.

By Mr. Larkin:

Q. Well, the two contracts you referred to are
2429 the two main contracts? A. Yes, sir.

Q. And one of the contracts was a right to manufacture under certain patents? A. Yes, sir.

Mr. McLaughlin: We make the same objection.

Q. And the other contracts was a right to sell these foreign cars?

Mr. McLaughlin: I object to that. The witness cannot be allowed to characterize the contracts. The contracts should be produced.

The Special Commissioner: Objection sustained.

Mr. McLaughlin: We move to strike out the witness's answers on the same ground.

2430 The Special Commissioner: No, I will let that stand.

Q. The real estate which you referred to was purchased by the Daimler Company, wasn't it? A. The Bayonne real estate?

Q. The Astoria real estate? A. Yes, sir, I think so.

Q. Did Kessler & Company organize it? A. They were interested in the organization.

Q. Then, after it was organized, you put up the money with which they purchased the Long Island property? A. No.

Q. After the organization of the Daimler Com- 2431
pany, did it purchase the Astoria property?

Mr. Elkus: I object to that. That is a matter
of record. How did he know? He wasn't an officer
of the Daimler Company.

The Special Commissioner: He is a director.

The Witness: You mean for cash, of course?

Q. I asked you if the Daimler Company, after
the organization, purchased the Astoria property?
A. It took that over. I don't know whether you
call it a purchase or not.

Q. Did they pay anything for it? A. I think
they paid in stock, yes, sir.

Q. In other words, the real property at Astoria 2432
was paid for by the stock of the Daimler Manu-
facturing Company? A. Yes, sir, that was paid in.

By the Special Commissioner:

Q. You issued stock for that property as part
of the capital? A. It was a reorganization of a
former company, and I don't know what the legal
aspect of the thing is.

Q. How much stock was issued against that real
property? A. That is for real and other property.

By Mr. Larkin:

Q. And how about the Bayonne property? A. 2433
That was paid for in cash.

Q. How much? A. About \$37,000.

Q. And when was that? A. I think in 1902.

Q. You stated about one of those contracts, one
of the principal contracts. What was the Charley
contract?

Mr. Elkus: I object to that. The contract speaks
for itself. I object to it as giving the contents of
a written instrument and permitting the witness
to give his characterization of a paper that speaks
for itself. It is incompetent.

2434 By the Special Commissioner:

Q. Can you produce the contracts? A. I think I could get them within a few days; yes, sir. I can tell all about the contracts; I know all about them.

Q. Well, will you produce them? A. Certainly.

Q. Well, will you produce them here; you can produce them next week some time? A. Certainly, yes.

The Special Commissioner: I will let him answer the question, reserving your right, Mr. Elkus, to move to strike out the testimony. He says he will produce the contract.

2435 Mr. Elkus: I may have my exception?

The Special Commissioner: Yes.

The Witness: The Charley contract was a license contract wherein the Daimler Company gave to Charley the right for the foregin Mercedes ear against the payment amounting from 15,000 to \$20,000 a year to the Daimler Manufacturing Company.

By Mr. Larkin:

Q. The Daimler Manufacturing Company have the exclusive right to make certain cars under patents. Charley, under the directions, could not
2436 import cars without your permission? A. Yes.

Q. And Charley was to pay you for the privilege of importing the foreign Mercedes ear? A. Yes, sir.

Q. I didn't quite understand you. That is what you meant? A. Yes.

By the Special Commissioner:

Q. You said \$15,000? A. I think it was \$15,000 in one year; 18,000 to \$20,000—a guaranteed minimum of \$12,500.

Mr. Elkus: This is all taken under the same objection and exception? 2437

The Special Commissioner: Yes.

By Mr. Larkin:

Q. Did Charley make these payments to you, to the Daimler Company? A. Yes, sir.

Q. When was the last payment made? A. I don't know—some time during the year 1907—every month.

Q. In February? A. They were to be paid every month.

Q. Well, he didn't make them every month? A. I think so, yes. 2438

By the Special Commissioner:

Q. Up to what time? A. I think up to the end. I think he still had a credit there of several thousand dollars.

Q. Charley has a credit? A. Yes, a deposit there of several thousand dollars with the Daimler Manufacturing Company now.

By Mr. Larkin:

Q. You simply credited his account? A. He paid \$7,000 on the 1st of January down in advance of any importations. 2439

By the Special Commissioner:

Q. And he has not imported enough to cover it? A. Last year he was somewhat short on importations and did not use up that whole amount, but he still owes now again \$12,500.

By Mr. Larkin:

Q. He never paid the money, but you debited his account? A. He did pay the money.

Q. You said \$7,000? A. \$7,000 on the first of each January.

2440 By the Special Commissioner:

Q. And he made a deposit on the 1st of January, 1907? A. Yes, sir.

Q. And then his importations amount to how much? A. To make up between 15,000 and \$20,000 a year.

Q. What was the result in 1907? A. I think he fell somewhat short of it. He was always to keep \$2,000 in the hands of the Daimler Manufacturing Company in advance.

Q. As I understand you, he was to import at least so that his license fee would amount to \$12,500 a year? A. That was guaranteed whether
2441 any cars were imported or not.

Q. In the year 1907, did he not only deposit \$7,000, but pay the other \$5,500? A. Well, in 1907 he did not guarantee the thing, yet he renewed the contract for five years more, guaranteeing that \$12,500 a year.

Q. That was not in the original contract? A. No; this was a contract renewed in 1907 for five years.

Q. On what date? A. In March of that year, 1907.

By Mr. Elkus:

2442 Q. Didn't the old contract have a guaranty too? A. No, sir; there was no guaranty by the old contract, but he produced more than \$12,500 under the old contract.

By Mr. Larkin:

Q. What was the capitalization of the Daimler Company? A. You mean issued and outstandings?

Q. What was the authorized capitalization? A. \$350,000 of preferred and \$350,000 of common.

Q. And what were the debentures? A. No debentures.

Q. No bond issue? A. No.

By the Special Commissioner :

2443

Q. What was it—a New Jersey corporation? A. No, it was not a New Jersey corporation; a New York corporation.

By Mr. Larkin :

Q. And Kessler & Company had all the stock, didn't they? A. Not all the stock, no.

Q. How much? A. A majority of the stock.

Q. Did they only have a majority? A. No; they had considerably more than a majority.

Q. Did they have 80% of it? A. Yes, sir.

Q. Did they have 90%? A. No, sir, not 90%; I think 80%.

2444

By the Special Commissioner :

Q. Both common and preferred? A. On the common; the preferred was not all issued yet.

Q. How much of the preferred? A. \$144,000 of the preferred was issued.

Q. How much did they have? A. About \$134,000 of that.

By Mr. Larkin :

Q. Is the Daimler Company still manufacturing automobiles? A. In a small way, sir.

Q. They are?

2445

Mr. Elkus: I make the same objection.

The Special Commissioner: Objection overruled.

Mr. Elkus: Exception.

A. Yes, sir.

Q. Is it not a fact that judgment was taken here only a few weeks ago and the sheriff sold out the concern?

Mr. Elkus: I object to January, 1908, as too remote. It is incompetent, immaterial and irrelevant.

The Special Commissioner: Objection sustained.

2446 By Mr. Elkus:

Q. The judgment is paid anyhow? A. Yes, sir.

By Mr. Larkin:

Q. Do you know how many automobiles the Daimler Company has made during the past three months?

Mr. Elkus: Objected to as incompetent, immaterial and irrelevant; too remote in point of time.

The Special Commissioner: Objection sustained.

Q. Do you know how many machines the Daimler Company made in October, 1907?

2447 Mr. Elkus: Same objection.

The Special Commissioner: You may answer that question, if you know.

Mr. Elkus: Exception.

The Witness: I do not know.

Q. Is there anybody that knows anything about the Daimler concern? A. I do

Q. You know as much about it as Alfred Kessler? A. I know more about it.

Mr. Elkus: I object to that and I ask to have it stricken out.

The Special Commissioner: Yes; it may be stricken out.

2448

Q. These securities, of course, are not to be listed on the Stock Exchange? A. No, sir.

Q. And the stock had not been put on the market? A. No, sir.

Q. You had formed this company for the purpose of selling stock eventually—isn't that true? A. There was a large block of stock sold at one time.

Q. When was that block of stock sold? A. Well, five or six years ago, I believe.

Q. And how long has this company been in existence, in business? A. About 10 years.

By the Special Commissioner:

2449

Q. You are speaking now of the reorganized company? A. Yes, sir.

Q. Was it reorganized 10 years ago? A. I think it was in 1898; yes, sir.

By Mr. Larkin:

Q. It is not dealt in on the Curb or anything of that kind? A. No, sir.

Q. And the way you tried to dispose of it was by private sale? A. Yes, sir.

Q. And there have been no sales made of it during the last five or six years? A. No, sir; practically none. 2450

RE-CROSS-EXAMINATION BY MR. ELKUS:

Q. How many shares were in this block that were sold five or six years ago? A. At that time, it was a majority of the company.

Q. To who was it sold? A. To a Philadelphia syndicate.

Q. How much was it sold for?

Mr. Larkin: I object to that.

The Special Commissioner: It is too remote. I will sustain the objection on that ground.

Q. Were there any sales since that time? A. 2451 There were a few, yes.

Q. Preferred or common? A. At that time there was only common stock outstanding.

Q. Not five or six years, but I mean when these sales were made since, were there any shares of preferred stock sold? A. About six or \$7,000 worth.

Q. You mean par values? A. Yes, sir.

Q. Was that preferred? A. Yes, sir.

Q. When was it? A. Well, about that time, five or six years ago.

2452 Q. Has there been any sold since that time? A. I do not think so.

Q. Any of the common stock sold since that time?

A. Nothing to amount to anything.

Q. Was any of it sold? A. No, I don't think so.

Q. What were these six or \$7,000 par value sold for?

Mr. Larkin: I object to that; it is too remote.

The Special Commissioner: Yes, I think it is too remote—five or six years ago. I will sustain the objection.

Q. You say that the company, this Daimler Company, sold this land in Bayonne, New Jersey, at a profit? A. Yes, sir.

Q. How much profit did they sell it for? A. About \$10,000.

Q. And the land in Long Island City or Astoria was purchased for stock. How much stock was issued for it?

Mr. Larkin: I object to that.

Objection overruled. Exception.

Q. How much of the stock of the Daimler Company was issued for this real estate?

Mr. Larkin: I object to it on the ground that that hasn't any bearing upon the value of the property at the time of the bankruptcy.

Objection overruled. Exception.

A. The sale was made for more than it was stated on the books, Mr. Larkin.

Q. How much stock was issued? A. About \$78,000.

Q. And was part of that land sold? A. Yes, sir.

Q. For cash? A. Yes, sir, cash and a mortgage.

By the Special Commissioner:

Q. Was this \$78,000 an issue of common? A. Common.

By Mr. Elkus:

2455

Q. Was it full-paid and non-assessable stock? A. Yes, sir, I guess so.

By the Special Commissioner:

Q. You guess so? A. Yes, sir, it was.

By Mr. Elkus:

Q. Some of this land was sold for cash and mortgage? A. And the mortgage has since been paid.

Q. How much was it sold for altogether? A. Fifty-four or \$55,000.

2456

Q. In money? A. Yes.

By the Special Commissioner:

Q. When was that? A. That was sold in 1902, as far as I remember.

By Mr. Elkus:

Q. How many lots were sold, or how much in proportion? A. Those were not lots at all; that was water front property.

Q. What proportion of the land was sold? A. About one-half.

Q. Were there any buildings on the land sold? A. Yes, sir.

2457

Q. What kind of buildings—factories? A. Yes—a boat-building plant.

Q. But the main buildings for the manufacture of automobiles were on the land retained by the company? A. Yes, sir.

By the Special Commissioner:

Q. Did this company ever pay any dividends? A. No, sir.

Q. Never? A. No, sir.

- 2458 Q. Either on the preferred stock or on the common stock? A. No, sir.

By Mr. Elkus:

Q. What were the company's earnings the year of the fire?

The Special Commissioner: When was the fire?

Mr. Larkin: February, 1907.

By the Special Commissioner:

Q. What was the fiscal year of the company?

A. It ran to October 1st, 1906.

- 2459 Q. From October 1st, 1906, to October 1st, 1907?

A. That would have been the fiscal year.

Q. What were the results of the business for that year? A. There was a fire. The business that year was not ended. You mean the previous year?

Q. No, for the year ending October 1st, 1907?

A. We had a fire in October 1st, 1907. Do you mean the year before?

Q. No; I want to know whether you made any net profits? A. Not in 1907.

Q. For the fiscal year ending October 1st, 1907?

A. No, there were no profits.

By Mr. Elkus:

2460

Q. What were the profits, if any, from October 1st, 1906, to the date of the fire?

Mr. Larkin: I object to that. The question is not what was the condition of this company, but what was the condition of the company and the value of the securities at the time of the failure of Kessler & Company or at the time of the delivery of the escrow on Kessler & Company.

Objection overruled. Exception.

Q. What were the net profits for the year ending October 1st, 1906?

Mr. Larkin: If you know.

2461

The Witness: They made 6% on all the moneys they had, 6% on the preferred stock and about 1½% on the common stock.

Q. They made 6% on all the money they owed?

A. Yes, sir.

Q. How much was that? A. That was different amounts during the year.

Q. Average it? A. Several thousand dollars.

Q. Did the company pay the 6% on all the money they owed—interest? A. Yes, sir.

Q. And they made 6% on the preferred stock of \$350,000? A. Of \$150,000.

2462

Q. \$350,000, you said? A. \$150,000.

Q. That is \$9,000? A. Yes, sir.

Q. And 1½% on the common? A. Yes, sir.

By the Special Commissioner:

Q. That was how much? A. \$4,500.

Q. What was the amount of their indebtedness at the close of the year? A. About \$450,000.

Q. They had reduced it from 700,000 to 450,000? A. I said several hundred thousand dollars.

By Mr. Elkus:

Q. Now, between October 1st, 1906, and the date of the fire in February, 1907, did they make any profits—the company? A. Yes, sir.

2463

Q. How much? A. I couldn't tell that. I would have to look that up.

By the Special Commissioner:

Q. How much did they lose by the fire? A. Over \$150,000.

Q. And put a stop to the business? A. Yes, sir. They sold their cars that they had on hand, but they did continue manufacturing only in a small way.

2464 Q. What has become of their indebtedness of \$450,000? A. That was reduced by the moneys received from the fire insurance.

Q. How much was it reduced? A. \$350,000.

Q. Reduced by the sum of \$350,000? A. Yes.

Q. So that they have an indebtedness now of how much? A. \$50,000.

Q. Only \$50,000? A. \$64,000, so far as I know of.

By Mr. Elkus:

Q. And they still own these contracts? The company still owns the contracts? A. Yes, sir.

2465

By the Special Commissioner:

Q. Is that all the property they have got left now? A. The buildings and the real estate and the mortgage and the supplies on hand.

Q. Now? A. Yes, sir.

By Mr. Elkus:

Q. And some automobiles? A. I think they have five automobiles, yes, sir.

By the Special Commissioner:

2466 Q. What is this mortgage—on the Bayonne property? A. Yes, sir.

Q. How much is that? A. \$32,500.

Q. Is interest paid on that mortgage? A. Yes, sir.

Q. What does it cover? A. Water front property in the City of Bayonne, which was sold for \$47,500.

Q. Who sold it? A. The company sold it; yes, sir.

Q. And who are the mortgagors? A. Terry & Tench Company. They paid \$15,000 in cash and the balance in mortgage.

Q. Is that a going concern? A. Yes, sir.

Q. What other assets have you? A. Besides the cars?

Q. Besides the cars? A. Only supplies, machinery. 2467

By Mr. Elkus:

Q. You have real estate in Astoria? A. Yes, sir, we have real estate in Astoria.

By the Special Commissioner:

Q. That is real estate that you paid originally stock for? A. Yes, sir, but part of that, as I explained before, has been sold for \$64,000.

Q. How much have you got left? A. About thirty to \$35,000 worth.

Q. And is that subject to mortgage? A. There 2468 was a mortgage put on to secure a loan of \$64,000, which I just mentioned, in October. That was put on in October, 1907.

By Mr. Elkus:

Q. That \$64,000 that was secured by mortgage is the only indebtedness the company has? A. As far as I know, yes, sir.

Q. \$64,000 is the entire indebtedness as you understand, of the Daimler Company? A. Yes, sir, I was told that the other day.

Q. To meet that, you have the land in Astoria? A. Yes, sir.

Q. The mortgage on the Bayonne property of 2469 \$32,500? A. Yes, sir.

Q. As you have just said to Mr. Frankenhimer, the Daimler Company can pay your debt in preferred stock? A. Yes, sir.

Q. Then there is only \$64,000 besides that, and that is the same \$64,000 as is secured by the mortgage on the land in Astoria? A. Yes, sir; and practically that and the preferred and common stock are represented only by the contracts and a few other cars, supplies, buildings and whatever else there may be.

2470 By the Special Commissioner:

Q. Is there any equity in that land over there?

A. Oh, I think so; yes, sir. On the basis of that offer that was received last summer and was declined, there is an equity there.

By Mr. Elkus:

Q. What offer did you get? A. I cannot recollect that now.

By the Special Commissioner:

Q. You do not know what the equity is? A. Not
2471 more than \$10,000.

HOWARD B. COOK (resumed).

CROSS-EXAMINATION BY MR. ELKUS:

Q. Mr. Cook, you prepared the statement of which I show you a copy? A. Yes.

Q. Is it correct? A. According to the books, yes, sir.

Q. According to the books of Kessler & Company? A. Yes.

Mr. Elkus: I offer it in evidence.

Mr. Larkin: I object to it on the ground that what
2472 the books of Kessler & Company show hasn't anything to do with this case. It doesn't show what the facts are or pretend to show what the facts are. It shows the result of an examination, apparently, of the assets and liabilities as disclosed by the books of Kessler & Company, without showing any facts in connection with it.

The Special Commissioner: Mark it for identification first.

Marked Kessler & Company, Ltd., Ex. MM,
for identification.

Mr. Elkus: I suppose that copies may be used of that with the same force and effect as the original? 2473

The Special Commissioner: Yes.

By Mr. Larkin:

Q. Please describe that paper; you have produced it. A. We made it up—Haskins & Sells—for the assignee of Kessler & Company, Mr. Williams, merely as a memorandum.

By the Special Commissioner:

Q. You made it up? A. At the request of Mr. Williams, the assignee.

Q. And you made it up from the books of Kessler & Company? A. Yes. 2474

Q. And did you say you had not verified it? A. We did not verify any item on it.

Q. You merely took it from the books? A. Yes, sir, merely took the balances as shown by the debits and credits.

Q. You didn't verify the balances? A. No, sir.

By Mr. Elkus:

Q. You mean that each account was balanced in the books? A. No, sir, the account was not balanced. We took off the balance; we drew off balances. 2475

Q. That is, in the account that is referred to in that paper, you deducted the debit from the credit side? A. Yes.

Q. Where there was a balance or either way, vice versa, it was correctly deducted by your people? A. That is right.

Q. That you know as a fact? A. Yes, sir.

Q. You assumed that the entries in the books were correct? A. Yes, sir.

Q. And a correct statement of the transaction? A. Yes, sir.

2476 Q. And then the balances were drawn by your people? A. Yes, sir.

Q. So that, if the entries were correct entries the balances were absolutely correct? A. Yes.

Q. And you took every account in the books? A. Yes.

Q. And entered it on the debit or credit side of that statement? A. Yes; but the classification was made by Mr. Kessler and Mr. Flinsch and Mr. McLean.

Q. The classification—whether it should be debtor or creditor? A. No.

2477 Q. The debtor or creditor side was determined by you? A. Yes.

Q. And correctly determined? A. As to the balance only; but the balance was not verified beyond the face of the books.

By the Special Commissioner:

Q. The balances you took from the books? A. Yes. We took the balances from the books. May I explain how it was done?

Q. No, just you answer the question. A. We took the balances from the books.

2478 Q. What do you mean by taking the balances from the books? Do you mean to say that the figures had been added up and balances struck in the books, or did you add them up yourself? A. We added up the debit and credit items, and if the credits exceeded the debits, we would deduct the debits from the credits and show the remainder as a credit balance, and vice versa.

Q. Those balances you entered in that book, didn't you? A. Yes, sir.

The Special Commissioner: I think that the paper is admissible so far as containing an inventory or statement of the assets and liabilities of the bankrupt, subject to correction, but I do not think it is any proof as to the value of their assets.

There may be errors. The bankrupts may put in²⁴⁷⁹ liabilities that are not liabilities that are not binding upon the estate or upon the general creditors.

By Mr. Elkus:

Q. You have the detailed statement from which this summary was finally made, haven't you? A. Yes, the trial balance. I have it. I don't know whether it is here or in our office.

Q. Will you get it and produce it? A. Yes.

Witness produces papers.

Q. You produce certain papers which are the trial balances which were made by your firm? A. ²⁴⁸⁰ Yes, sir.

Q. From which the summary which has been marked Kessler & Company, Ltd., Exhibit MM, for identification was made? A. Yes.

Q. Didn't you make up the schedules of the bankrupts? A. No, I supervised that. Mr. Shayne made up those.

Q. Your firm made it up? A. As far as putting down balances are concerned, but Mr. Seymour and Mr. Kessler put in the valuations.

Q. These valuations or figures were put in by Kessler & Company according to their books? A. Yes. You mean these (indicating).

Q. These? A. Kessler did not see those at all. ²⁴⁸¹ We took them from the books.

By Mr. Larkin:

Q. What do you mean by "these"? A. He was referring to the trial balances.

By Mr. Elkus:

Q. What you call a trial balance? A. Yes.

Mr. Elkus: I offer in evidence these sheets constituting the balances, which the witness has iden-

2482 tified as being the detailed statements from which the summary was made.

Received in evidence and marked Kessler & Company, Ltd., Exhibit NN.

Mr. Elkus: I offer in evidence the paper marked Kessler & Company, Ltd., Exhibit MM for identification.

The Special Commissioner: My ruling is that these valuations are not binding on the trustee or the general creditors. The paper is admitted so far as it presumably contains a list of assets and liabilities. So far as the value of the assets are concerned, I do not think it is admissible.

2483 Mr. Elkus: I may have an exception to the limitation of the admission?

The Special Commissioner: Yes.

Marked Kessler & Company, Ltd., Exhibit MM.

It is admitted that petitions for their adjudication as involuntary bankrupts were filed against Milne, Turnbull & Company on the 11th day of November, 1907, and on the 19 day of November, 1907.

RICHARD J. LYNCH, a witness called on behalf of Receiver being duly sworn, testified as follows:
2484

By the Special Commissioner:

Q. Where do you live? A. In Brooklyn.

Q. How old are you? A. Twenty-one years.

Q. What is your occupation? A. Clerk in the office of John Larkin.

DIRECT-EXAMINATION BY MR. LARKIN:

Q. Did you receive a subpoena for service upon Mr. Nestle? A. Yes.

Q. When did you receive it? A. On the 6th day of December, 1907.

Q. What did you do with it?

2485

Mr. Elkus: I object to it on the ground that it is immaterial and irrelevant, and in no way affecting this issue.

Objection overruled. Exception.

A. I intended to serve Mr. Nestle with it. I telephoned uptown to Mr. Kessler's house. I found out that Mr. Nestle had left there.

Mr. Elkus: I object to that—telephone conversations with no one present.

Objection overruled. Exception.

(The witness continues): I went around to Mr. Seymour's office and he informed me that Mr. Nestle was not there. I then went down to Staten Island. Someone in Mr. Seymour's office told me that he was not there, and told me where Mr. Nestle resided. I went down to Staten Island. I was informed down there by the lady of the house that he was not living there any more, and she gave me two addresses in New York City. I came back to New York and went to the German Club, in West 59th Street, where Mr. Dubois lived, and they informed me that Mr. Nestle had been there and gone out, and he had gone to the Waldorf. I telephoned down to the Waldorf and had him paged there.

2486
2487

By the Special Commissioner:

Q. What do you mean by that? A. I had them send a boy around calling out his name. Then I went to 270 West 76th Street, where I believe a Mr. Ihm resided. I found he was not there. And then I went to the Savoy Hotel, 59th Street, and found Mr. Nestle had been there, but had gone away. This was about eleven o'clock at night. I gave up then and went home.

Q. That was on Thursday? A. On Friday.

Q. You went up to court on Thursday? A. No,

2488 I went on Friday afternoon, and got the subpoena, the same afternoon.

By the Special Commissioner:

Q. Has he given the day of the month? A. The 6th day of December, 1907.

By Mr. Larkin:

Q. Mr. Nestle sailed on the 7th? A. Yes, I believe so, but I could not find his name on the passenger list.

CROSS-EXAMINATION BY MR. ELKUS:

2489 Q. What day was it? A. The 6th of December.

Q. Why didn't you go to the Waldorf Astoria to see if he was there? A. It was too cold.

Q. You say you went to the Savoy Hotel and found he had been there, or he lived there? A. It seemed that Mr. Ihm lived there. He lived there at the Savoy Hotel and Mr. Nestle was a friend of his.

Q. So you found two places where he had been that day? A. Yes, sir, the German Club and the Savoy Hotel.

Q. And how long before you had gone to the German Club had he been there? A. I got there
2490 about half past eight o'clock in the evening, and he had been there an hour before, and had gone to the theatre.

Q. Did you hear that? A. Yes, sir.

Q. Why did you telephone to the Waldorf? A. They told me he also lived at the Waldorf. He did not live at the German Club.

Q. You went to the Savoy and found he had been there. How long had he been there before you got there? A. About six o'clock in the evening. This was about ten o'clock at night.

Q. Did you find out what theatre he went to? A. No.

Q. Did you ask anybody? A. Yes, I asked the clerk at the desk. He said he was with Mr. and Mrs. Ihm. 2491

Q. Did you ask at the Savoy? A. That is where I asked.

Q. Why didn't you wait until Mr. Ihm came back? A. I didn't know whether he would come back for a month or so.

Q. You didn't know whether he would come back in a month or a year? A. No.

Q. That is why you went home? A. No.

Q. Was it too cold there in the hotel? A. No.

By the Special Commissioner:

2492

Q. When did you go to Staten Island? A. It was the afternoon or the evening of the 6th.

Q. The same day? A. Yes.

Q. Then what you did in an endeavor to serve him was done on the 6th of December? A. Yes.

By Mr. Elkus:

Q. Did you try to serve him on the 7th? A. No, I did not.

Q. Or the 5th? A. No, only on the 6th.

Q. How old are you? A. 21.

By Mr. Larkin:

2493

Q. When were you informed that Mr. Nestle was to sail? A. About two o'clock Friday afternoon.

Q. And you kept trying to serve until what hour on Friday night? A. After eleven o'clock.

Mr. Larkin: I rest.

Mr. Elkus: I move to dismiss on the ground that the plaintiff has failed to prove any cause of action as against the defendant; that he has failed to prove the cause of action alleged in his petition or bill; that he has failed to prove that there was any preference intended or made by the bankrupts

2494 to the defendant; that he has failed to prove that there was any transfer made for the purpose of hindering, delaying or defrauding creditors; and that he has failed to prove facts sufficient to constitute any cause of action whatsoever.

The Special Commissioner: Motion denied.

Mr. Elkus: Exception..

Mr. Elkus: I offer in evidence letter dated Manchester, February 17, 1903, to Kessler & Company of New York, signed Kessler & Company, Limited, by P. W. Kessler, Director.

Mr. Larkin: I object to it on the ground that it is three months and over prior to the time that the
2495 operating agreement was made, and is, therefore, immaterial and irrelevant.

Ruling reserved.

HORACE BACON, a witness called on behalf of Kessler & Company, Limited, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. ELKUS:

Q. Where do you live? A. I live in New York City, 54 Morningside Park West.

Q. What is your business? A. Banking.

Q. Are you connected with any firm? A. I am a
2496 member of the firm of Kissel, Kinnicutt & Company.

Q. Where is their place of business? A. No. 37 Wall Street.

Q. Were you formerly employed by the firm of Kessler & Company? A. Yes, sir.

Q. When did you enter their employ and when did you leave it? A. On the 1st of March, 1883, I entered their employ, and I left it on the 1st of May, 1906.

Q. During the years 1903, 1904, 1905 and 1906, until you left them, what position did you hold there? A. I held full power of attorney from the

firm. I was a sort of general office man; I had 2497
general charge of the office.

Q. Did you know of the establishment of a so-called escrow in favor of Kessler & Company of Manchester? A. Yes, sir.

Q. Will you tell the referee what was done by you with reference to placing or setting aside the securities for Kessler & Company of Manchester? When you did it first? A. It was, I think, in June, 1903—about that time. The correspondence, I believe, shows. We received a letter—whether it was a private letter of the firm I cannot remember exactly—but at any rate I received instructions I know from Mr. Alfred Kessler, who was on the 2498
other side, to put one side in an escrow for Kessler & Company of Manchester certain securities. These securities I took out from among the securities belonging to the firm, placed them in an envelope, and the envelope was marked——

Mr. Larkin: I object to that unless he brings the envelope here.

The Special Commissioner: Yes.

By the Special Commissioner:

Q. You put them in an envelope, did you? A. Either an envelope, or, if the envelope was too small 2499
to hold them, they were all tied together in a package, with the list on the outside.

Q. Were they in that condition, in that envelope, the last time you saw them, in May, 1906, or whenever you left them? A. That I cannot say, sir. Sometimes they were in an envelope, or the list was written up on the front of them.

Q. You don't know exactly what became of that envelope? A. No, sir. If we ever made out a new one the old one was destroyed.

2500 By Mr. Elkus:

Q. What did you place on the envelope that you made out in the month of June, 1903? A. I put on it "escrow for Kessler & Company, Manchester."

Q. Do you remember what securities you put in the envelope at that time? A. No, sir; I do not.

Q. Did you know of a letter being written to Kessler & Company, of Manchester, in which the securities were stated at that time? A. Yes, sir. I think I dictated the letter myself.

Q. I show you a copy of the letter. See if that refreshes your recollection and whether you can say what securities were placed by you in the envelope?
2501

The Special Commissioner: You have got the original?

Mr. McLaughlin: Yes.

The Special Commissioner: Why don't you show him that?

The Witness: I remember the letter, if that is a correct copy of it.

Q. That is a correct copy? A. The original I know——

By the Special Commissioner:

Q. If that is the correct copy, you say that is it?
2502 A. Yes.

The Special Commissioner: Show him the original letter.

By Mr. Elkus:

Q. I show you the original letter. Look at the original? A. Yes, the original is correct.

By the Special Commissioner:

Q. That is correct? A. Yes, sir.

The Special Commissioner: What is the exhibit?

Mr. Elkus: Kessler & Company, Limited, Ex. B 2503 of December 2, 1907.

By Mr. Elkus:

Q. Who signed that letter? A Mr. Flinsch.

Q. Now, after looking at that letter and refreshing your recollection, will you tell the referee what securities were set aside by you, as you have told us, at that time? A. 1484—

Q. They are the same securities as are mentioned in the letter? A. They are the same as mentioned in the letter.

The Special Commissioner: You had better indicate what that Exhibit B is. 2504

Mr. Elkus: Exhibit B is a letter dated June 30th, 1903, written by Kessler & Company of New York to Kessler & Company, of Manchester.

Q. What was done with these securities after they were either placed in the envelope or tied up with the envelope? A. They were taken down to the Safe Deposit Company and put in the vault hired by the firm there on the upper shelf.

By the Special Commissioner:

Q. Did you do that? A. I did that, sir.

By Mr. Elkus: 2505

Q. And were they kept on this upper shelf by themselves? A. There were other things there on the same shelf.

Q. They were kept in a separate bundle? A. They were kept in a separate bundle.

Q. Either in this envelope, or attached to it? A. Yes.

Q. Tell us what was done in your own way?

By the Special Commissioner:

Q. You put them in the envelope, with the list on the outside, and took them down to what de-

2506 posit company? A. To the State Deposit Company.

Q. And where was that? A. Under the Bank of the State of New York.

Q. What did you do when you got it there? A. I put them in on the upper shelf in this vault. The vault had two shelves in it. The lower shelf was occupied by a big leather case that we carried back and forth every day, and then on the particular shelf were things that were not used very often—things that were more or less permanent—some things belonging to other people.

Q. Things you did not have occasion to use very
2507 often? A. Yes.

By Mr. Elkus:

Q. Did you keep in this vault of Kessler & Company stocks and bonds and securities belonging to other people? A. Yes.

Q. And were those securities kept on the same shelf on which you kept these securities of Kessler & Company, Limited, of Manchester? A. There were some, a few of them, but a great many of them were kept in the box that we carried out every day.

Q. The securities that were in use were kept in
2508 the leather box which was kept on the lower shelf?
A. Yes, sir.

Q. All the time you were with Kessler & Company, of New York, were the securities kept in that same place—on this upper shelf? A. Yes, sir.

Q. Was there any list of securities placed on the envelope? A. Either on the envelope or on a sheet of paper that was with it.

Q. When any changes were made in the securities, if any were made, what was done? A. Why, I took down the securities that were replaced, put them in and took these out. Sometimes there might be a lapse of a few days between putting them in

and taking them out, but it was usually done simultaneously. 2509

Q. Was any change made in the list of securities at that time? A. Every time.

Q. In those cases where there was a lapse of a few hours between the taking out and putting in, was the security which was used to replace the one taken out known to you? Was it designated before anything was taken out? A. Yes, sir.

Q. Was it or was it not a question of getting it from out of the city or out of the transfer office or something? But the security was known to you, as I understand you, which was to take the place of the one taken out, before anything was done? 2510

A. That is, to the best of my memory. I cannot remember a case where it was not.

Q. What was your custom with reference to notifying Kessler & Company of Manchester, about any change of securities?

Mr. Larkin: All that appears in the letters that have passed between them.

Mr. Elkus: I think it is proper to have him testify he was instructed.

Q. What did you do in each case where exchange was made up?

2511

By the Special Commissioner:

Q. What did Kessler & Company do? A. If Mr. Kessler was there he always gave me instructions and always attended to it himself. I made the changes and told him they had been made.

By Mr. Elkus:

Q. When he was not there who did it? A. Probably I did it when he was not there.

Q. Did you do these same things during all the time you were with there with reference to these

2512 securities? A. I think so, yes, sir. Sometimes when I was away somebody else might have done it.

Q. During this time, from 1903 to 1906, inclusive, did anyone come from Kessler & Company of Manchester and do anything with reference to these securities? A. I think once there was an accountant came over from them.

Q. When was it he came? A. I cannot remember the exact date.

Q. What did he do? What did you see him do? A. I brought out the escrow as I remember it, and he went over it and checked them off.

Q. The securities from the safe deposit vault?

3513 A. Yes.

Q. Were you here when P. W. Kessler came over here and did the same thing? A. I was not with Kessler & Company then. You mean on this last trip?

Q. Yes. A. No.

CROSS-EXAMINATION BY MR. LARKIN:

Q. Did Kessler & Company have any safe deposit vault—any other one than the one in the State Deposit Company at that time? A. Yes, sir.

2514 Q. Where was that? A. They had one in the National at 32 Liberty Street.

Q. What was kept there? A. There were kept there securities belonging to other people where they only wanted to cut off the coupons twice a year and so on.

Q. And how long was that box kept? A. I couldn't say exactly—some years.

Q. And at the time you left? A. It was still there at the time I left.

Q. Why were these changes made in these securities? A. In the escrow, you mean?

Q. Yes. A. I suppose sometimes they may have wanted to make some special loan and they wanted to put them in on those special securities.

2515

By Mr. Elkus:

Q. If you don't know, why, say so? A. I don't remember exactly.

By Mr. Larkin:

Q. You do remember that sometimes they were sold, don't you? A. They might have been.

Q. And on other occasions, loans were made with institutions and they became a part of the collateral? A. Or they may have——

Mr. Elkus: I object to what might have been done.

The Witness: I don't remember any specific case. 2516

By the Special Commissioner:

Q. Don't you know why there were changes made from time to time? A. I only know on general principles. That is usually the case where changes are made in collaterals that some of them were sold or that they made some special loan to some other institution and they could put those securities in to advantage.

Mr. Elkus: I move to strike out the answer as mere supposition and conclusion and not a fact, and as incompetent.

2517

No ruling.

By Mr. Larkin:

Q. Do you know of a case where the securities were taken out where they were not sold or hypothecated? A. No, I do not.

Q. And all the occasions that you know about were changes that were made in case of sale or in case of hypothecation? A. I wouldn't say that positively, sir. I changed everything on instructions. I always had my instructions. Mr. Kessler

2518 would come in and tell me to do so and so, to change so and so.

Q. Did you happen to know those securities were sold at that time? A. Undoubtedly, I knew it, if they were sold.

Q. And you also knew that in some cases they became a part of the loans which were made to other banks or institutions? A. Very probably.

Q. Isn't that the best of your recollection? A. That is the best of my recollection.

Q. Isn't that what bankers do with securities? Mr. Elkus: I object to that.

Q. You say this safe deposit vault had two
2519 shelves? A. Yes, sir.

Q. And in one, the lower shelf, was the leather bag that went back and forth every day? A. A square, leather case.

Q. And in how big a compartment was this lower shelf in which this leather case was left? How did it compare with that upper compartment inside? A. About the same size.

Q. And was the lower compartment filled with this leather case when it was in there? A. Just about—a little space on either side of it and over it.

Q. So that the upper compartment was substantially filled or pretty well filled with securities as
2520 well? A. Fairly well. It varied. Sometimes it was and sometimes it was not.

Q. You have, I think, stated that the letters relating to this escrow were in the shape of private letters? A. Either private letters, or confidential letters, to the firm. They did not go in the ordinary files.

Q. Or through the ordinary channels in the office? A. No, sir.

Q. I think you also stated that when this accountant was here that you have referred to you went yourself over to the safe deposit vault, you took out these securities and brought them to the

office and showed them to this accountant, and that, 2521
after he had examined them, you took them back
and put them back there? A. Yes, sir.

Q. Did you go over to the safe deposit vault
every day, Mr. Bacon? A. Yes, sir.

Q. That was a part of your duties? A. Yes, sir.
I usually accompanied the box back and forth.

REDIRECT-EXAMINATION BY MR. ELKUS:

Q. These letters you say were either confidential
letters addressed to the firm or private letters? A.
They were all addressed to the firm, or members of
the firm? A. Yes, sir. 2522

Mr. Larkin: Describe them. The letters them-
selves will show how they were addressed.

Mr. Elkus: I am asking how they were addressed.

The Witness: I think they were always addressed
"confidential."

Q. Marked "confidential"? A. Marked "confi-
dential."

Q. They came to the office, however? A. They
came to the office.

Q. You saw them? A. Yes.

Q. And several other clerks saw them? A. Not
several. 2523

Q. One? A. Well, I think——

By the Special Commissioner:

Q. Who else beside you and Mr. Kessler and Mr.
Flinsch? A. I doubt if anyone else—possibly Mr.
Magie.

Q. Mr. McLean? A. Possibly, but I couldn't
say.

Q. Well, you know there were three people? A.
I don't know.

2524 By Mr. Elkus:

Q. And they were answered, I suppose. When you wrote to Kessler & Company of Manchester, did you write—the firm wrote the letters, didn't they? A. No, we usually dictated to the stenographer. They were——

Q. They were dictated, but signed in the firm name? A. Oh, yes, sir.

Q. They were dictated to a stenographer? A. Yes, sir.

Q. And a copy was kept in each instance? A. I think so, yes, sir. That was the custom.

2525 RECROSS-EXAMINATION BY MR. LARKIN:

Q. These letters came addressed, didn't they, to Mr. Alfred Kessler? A. I suppose some of them may have. I wouldn't say that he didn't get any of them, but of course, I don't know.

Q. Is it not a fact, and will you not refer to the letters and see if they were not addressed "private and confidential"? A. Well, I think it is quite likely.

Q. And so far as you know, Mr. Alfred Kessler and yourself and one other person, probably, saw this correspondence? A. Yes, sir.

2526 Q. But the other clerks in the office, except these three you have named, did not see it? A. No, sir, I think not.

Q. The letters were pressed in Mr. Alfred Kessler's personal and private letter books, weren't they? A. Sometimes they were.

Q. The firm had a private letter book that they kept certain letters in? A. Certain very confidential letters may have gone in that.

Mr. Larkin withdraws his objection to the letter dated Manchester, February 17th, 1905, to Kessler & Company, of New York, signed Kessler & Company, Limited, by P. W. Kess-

ler, Director, which letter was offered in evidence at the last session by Mr. Elkus, and it is accordingly received in evidence and marked Kessler & Company Exhibit OO. 2527

NEW YORK, February 17, 1908.
3.30 P. M.

Met pursuant to adjournment.

Same appearances.

2528

Mr. Elkus: We offer in evidence letter from P. William Kessler, of Kessler & Company, Manchester, dated September 26, 1907, to Alfred Kessler, of New York. It is an answer to a letter of the 6th of September, written by Alfred Kessler to P. W. Kessler.

Received in evidence and marked Kessler & Co., Ltd., Ex. PP.

It is conceded that Ex. PP was actually written by P. W. Kessler to Alfred Kessler and mailed to him on or about the date it bears date, and received by Alfred Kessler.

2529

Ex. PP is as follows:

"KESSLER & CO., LIMITED.

Telegrams, 'Kessler'

MANCHESTER, 26 Septber, 1907

DEAR ALFRED:

I safely received your letter of the 6th. It was much what I expected and not altogether pleasant reading. I sent it on to Eddy for his comments. I

2530 am very sorry for you, but with that enormous line of drawings on us, I am afraid I cannot leave all the worry to you. If those drafts should want caring for, we should find ourselves in a very bad hole, and I must say I am not easy.

I saw Flinsch in Frankfort and had a long talk with him. Since getting back I have written him a long letter, of which I enclose a copy.

You will see from it that I place most stress on the trouble with Gillett. If you are to have a real partnership upset, I don't see what is to become of you, unless you can find some rich man to take you over, whilst you liquidate the old position. But, 2531 as usual, you won't have time for any new arrangement, and it will be by pure luck if you find a way out, always assuming, of course, that Gillett is going to give trouble. Flinsch is positive that he can fix him. I am not so sanguine.

With regard to the current business, if Flinsch can bring the C. C. C. deal to a head and accomplish something with Daimler, his stay over there would be more than justified, but I am very much afraid that he will have to skip over at short notice to take a hand in the Gillett matter.

One thing that worries me is that Flinsch is not a really well man, and I fear a break-down under stress. He appears to have been really very ill in 2532 Frankfort, and is by no means up to standing a strain now.

We did not touch much on the executor's letter. There really was not much to say. How you use it vis a vis Gillett is so mixed up with your other questions with him that it becomes a question of expediency, and I don't know how all that may be at any given moment.

With regard to Daimler, Flinsch is very anxious to get the German people to take it over, and says he made a great mistake two years ago in not staying on here, when the chances of doing something

seemed bright. I don't think he is very sanguine ²⁵³³ now, but he wants to have a good try. It is worth giving a big discount to get the thing off your hands.

You will gather from my letter to F. that he complained of stock acct. and to some extent of the large credit used by Milne T. & McLeay. I am afraid the former has gone beyond himself and will want holding, but I don't think that in itself, that sort of business is unsound. Rather the contrary.

The stock acct. does seem big in sundries, especially so at a time when a slump seemed so likely to come. The worst is that I am afraid there is more to come and that unless you have got out you will ²⁵³⁴ have a further shrinkage to face.

You make a suggestion that I should join you in Gillett's place. I don't see how that can be. I have no money to put up and all I can scrap together I want over here. So I could bring in no financial strength. Further, my own dealings don't leave me to taking up fresh responsibilities. Rather I should like to see a way to an easier life. I am getting on and I should like to feel freer to enjoy life while I am still capable of enjoyment, though for some time still I must be tied down here.

What about Rudolf Kissel? If he could get say \$500,000 special from some of his friends, true ²⁵³⁵ perhaps, (?) whilst you liquidated the old partnership, the thing could go on without a break and you would at least have a gentleman as associate. I quite see, however, that you have a tough time, to get over.

Henri has just gone. He may possibly be useful to you if you are having trouble with Gillett and of course he is also an executor of the estate and can have a say on that head, tho' so far, all this has been mostly in my hands. But he is better at talking than I am and may thereby accomplish more than I should.

2536 That Westmoreland thing begins to look awkward. I hope you dont have to go on putting more money into it. It ought, of course, never to have been touched.

Are U. S. Brewery bonds saleable yet? I should have thought Chicago might have gradually taken to them. And if you dont care yet to sell your own, some of the people for whom you are carrying might be willing to let go. You just want all the cash you can put your hands on.

I dont know that I can say anything more, but I do feel anxious and should particularly like to hear how you are getting on with Gillett. Edgar got
2537 home yesterday and I shall be starting him at work on Monday probably.

I had quite a pleasant but hurried trip to F'fort and Neuchatel. The weather was fine and the two boys gave one something to think about. We have had 3 weeks of real good weather, but it is breaking up now. Yesterday was about the warmest day of the summer.

Good bye now. With best love to Ada, I am,
Your affectionate brother,

P. W. KESSLER."

FREDERICK C. McLAUGHLIN, a witness called on
2538 behalf of Kessler & Company, Limited, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. ELKUS:

Q. Where do you reside and what is your profession? A. I live at White Plains; I am a lawyer by profession.

Q. Where is your office? A. 32 Liberty Street, New York City.

Q. What is the name of the firm of which you are a member? A. McLaughlin, Russell, Coe & Sprague.

Q. Are they the attorneys for Kessler & Company 2539 of Manchester? A. We are.

Q. And for the liquidator of that concern? A. We are.

Q. When did you first see the securities which Mr. Henry Kessler took from Kessler & Company in October, 1907? A. I think it was the day after the general assignment for the benefit of creditors.

By the Special Commissioner:

Q. That would be the 31st of October? A. I think so; yes, sir.

By Mr. Elkus:

2540

Q. Where were they when you saw them? A. They were in the vault of the North American Safe Deposit Company on Exchange Place.

Q. I show you a paper purporting to be a statement of the securities, with the endorsements and assignments thereon of such securities, and ask you if that is correct as you saw them on the 31st of October and as they were turned over to Henry Kessler on October 25, 1907? A. I have seen this paper before and examined it carefully, and I know when and by whom it was made. I can only state what the changes have been in the securities from the time when I saw them, October 31st, up to the 2541 time that this list was made out in the Hanover Safe Deposit vault.

Q. What changes have there been since that time, if any? A. As to Item 17 on this list, what is here-in described was not contained in the securities at the time I first saw them at all, but we found there a bond and mortgage from Catherine I. Mackay and husband, as described under Item 17 on this list and covering the property there described, and we found an assignment of that mortgage in blank. We also found a deed in blank from Gillett and wife covering the same property. I saw Mr. Henry Kessler

2542 fill his name in in the blank as the grantee—as the assignee.

Q. When was this? A. The day when I visited the vault with him.

By the Special Commissioner:

Q. Henry Kessler? A. Yes, sir. He did it under my advice, and I took the assignment and the deed and recorded them with the Register of the County of Kings. I recorded the assignment of the mortgage and I recorded the deed, both as a mortgage and as a deed, and those original papers are now in the custody of the Register of the County
2543 of Kings, not having been returned, although instructions had been left to return them to us when they had been recorded. Then, as to Item No. 2, the note, at the time I first saw the securities, was endorsed in blank by Kessler & Company.

Q. What note was that—whose note? A. The note of Milne, Turnbull & Company, dated July 11, 1907, and the endorsement of Kessler & Company, Limited, had not then been put on. The same is true as to the note of R. B. Maclea & Company.

The Special Commissioner: Wasn't there more than one note of Milne, Turnbull & Company?

Mr. Larkin: There were several notes, but he only
2544 endorsed them as it became necessary to have them protested.

Mr. McLaughlin: The same is true as to Item 5, the note of R. B. Maclea & Company. At the time I first saw these securities, that note was endorsed in blank, but it did not have attached to it certificate of protest, as herein stated.

By Mr. Elkus:

Q. Other than as you have stated, is the list which you have been shown a correct and accurate description of the securities as you found them on October 31st? A. To the best of my knowledge, yes.

Q. And this list which has been shown you was²⁵⁴⁵ made up by Mr. Sprague and a representative of Mr. Larkin's?

By the Special Commissioner:

Q. Is that the fact? A. Well, I am informed that it is.

Mr. Elkus: That is the fact?

Mr. Larkin: Yes.

Mr. Elkus: I offer in evidence, as part of Mr. McLaughlin's testimony, this list, a part of which has been stricken out by lead pencil.

(Received in evidence and marked Kessler²⁵⁴⁶ & Company, Ltd., Ex. QQ).

By Mr. Elkus:

Q. Did you have an interview with Mr. Henry Kessler on the 24th of October, 1907? A. I did.

Q. Where was that interview? A. At my office, No. 32 Liberty Street, in this city.

Q. Had you ever met Mr. Henry Kessler before? A. I had not.

Q. Had he had, prior to that time, business relations with your firm? A. I was then informed that his coexecutor——

Q. Well, the estate of which he was a representa-²⁵⁴⁷ tive? A. —had had some business with Mr. Sprague, my partner.

By the Special Commissioner:

Q. For the estate? A. For the estate; yes, sir.

By Mr. Elkus:

Q. What time was it that you saw Mr. Henry Kessler? A. To the best of my recollection, about half-past two in the afternoon.

2548 The Special Commissioner: Now, this is the 24th of October?

Mr. Elkus: Yes.

Q. He says it was after four o'clock. Is he mistaken about that? A. I think it was earlier than that.

Q. Will you state the conversation; state what took place?

Mr. Larkin: I object to that as incompetent and irrelevant.

The Special Commissioner: I will allow you to move to strike it out, Mr. Larkin, if you think it is incompetent or irrelevant. You can go on and state the conversation, Mr. McLaughlin, unless you should be interrupted by some motion.

The Witness: Mr. Kessler stated to me that he had called to see Mr. Sprague.

Q. Henry Kessler? A. Mr. Henry Kessler. That Mr. Sprague some time previous had had something to do with a matter between the executors of the estate of William Kessler and Kessler & Company of New York; that Mr. P. W. Kessler had charge of the matter, and Mr. Henry Kessler said he did not know much about it. Mr. Henry Kessler said that he was over in this country with his wife on a pleasure trip, and that he had stopped in to ask Mr. Sprague a question. I told him that Mr. Sprague was out and asked if I would not do. I then asked him who this firm of Kessler & Company of New York were, stating that I had never heard of them. He told me they were a banking firm at No. 54 Wall Street. He then told me that he had recently heard that one of the members of this New York copartnership, of which the estate of William Kessler was a creditor, had been transferring or was transferring property to his wife, and he wanted to know whether the executors of the estate of William Kessler could prevent a member of the New York partnership

from transferring property to his wife. I asked ²⁵⁵¹ him if the firm of Kessler & Company of New York was solvent, and he said "They are absolutely solvent." I asked him if the firm assets of Kessler & Company, exclusive of whatever personal property the partners might have, was sufficient to pay its debts.

Q. Personal—individual property? A. Individual property, yes. He said, in effect, that he had no reason to doubt that it was. He said it was an old, reliable banking house and that its credit and reputation were of the best. I then advised him that, if the New York firm was perfectly solvent, and if its firm assets were sufficient to pay the firm debts, ²⁵⁵² leaving out of account what the individual members might have, it was not the business of any firm creditor as to what a member of that copartnership might do with his property, and I said to Mr. Henry Kessler that Mr. Gillett could throw his property into the East River, if he chose, and that no creditor of Kessler & Company of New York could prevent it. He then said, "Well, the firm of Kessler & Company of New York are perfectly solvent," and stated that his own Manchester firm, Kessler & Company, Limited, were creditors of the New York firm to the amount of a half a million dollars. I expressed surprise at this, and asked him if that indebtedness was not secured. He said that it was secured by ²⁵⁵³ an escrow. I asked him what he meant by an escrow, by the word "escrow"—what kind of security that was. He then said that the collateral for this indebtedness was deposited here in New York in the safe deposit box of Kessler & Company of New York as security for this indebtedness. I then asked him if it was in the possession of Kessler & Company of New York, and he said that it was in their safe deposit box. I asked him if his lawyers—if they had advised him—had advised his firm—the English firm—that that way of doing business was safe, and

2554 he said that they had not taken advice on that subject, but that he understood it was the general custom and practice where American houses gave security for foreign loans. I then went into a long story about a case that I had had some months back, where a client of mine had consulted me in regard to certain hosiery merchandise.

Q. You referred to some case that you were familiar with? A. Yes; the case of advances on hosiery, where I had occasion to look into the law, and I told him that I regarded that arrangement as not a safe one and that I advised him to go down and take possession of his securities.

2555 Q. Take them into his actual possession? A. Take them into his actual possession. He smiled and thanked me for the advice, said that Kessler & Company were perfectly solvent, and said he did not care to take the responsibility of disturbing any present arrangements. I told him that I thought it was a responsibility that he ought to take, and urged him to do so. He again smiled, and said that he did not think he would do anything at the present time. Shortly after, Mr. Sprague came in. I asked him to come into the office, and, in the presence of Mr. Kessler, I told Mr. Sprague what Mr. Kessler had told me and what I had advised him, 2556 and that I deemed it a matter of considerable importance, and asked Mr. Sprague if he agreed with me. Mr. Sprague stated in Mr. Henry Kessler's presence that he did agree with me, and that Mr. Kessler should take possession of these securities. Mr. Kessler again said that everything was all right and that he did not feel called upon to do such a thing, and did not wish to take the responsibility, and I then left the room and left him with Mr. Sprague.

Q. Is that all that took place? A. That is all that took place in my presence.

CROSS-EXAMINATION BY MR. LARKIN :

2557

Q. Well, you had not known Mr. Kessler of Manchester or any of the Kessler family, had you, up to that time? A. I had never heard of them.

Q. Now, how long have you been associated with Mr. Sprague in business? A. I think about four years.

Q. And this interview with Sprague had occurred, then, prior to four years, had it? A. No, it had not.

Q. Well, was this consultation with Mr. Sprague by P. W. Kessler in writing? A. I am informed by Mr. Sprague that it was not; that it was a personal interview. But I have no personal knowledge 2558 of that.

Q. Did you ask him where he got the information about one of the partners transferring his property? A. I did not.

Q. Did he state why the partner was transferring his property? A. He did not, but he said a good deal about Gillett.

Q. Did he say that he had met Gillett? A. He did not.

Q. Did he tell you that Gillett had authorized him to insert his name in a deed? A. A deed?

Q. The deed which stood in his name, to Gillett, of the Brooklyn property? A. He did not.

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Q. He did not, did he? A. He did not.

Q. He did not tell you that he had met Gillett or had any talk with him about the Brooklyn property, did he? A. He did not.

Mr. Larkin : I move to strike out all the evidence which has been given by Mr. McLaughlin regarding the conversation that was had between himself and Mr. Henry Kessler, on the ground that Henry Kessler was asked what this conversation was on direct-examination. He was then cross-examined by Mr. Elkus, and his attention was called to certain parts of his conversation on cross-examination, and I say that he cannot be contradicted on that. If that is

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2560 the purpose of this evidence, I say that a foundation for such contradiction has not been laid. If that is not the purpose of this evidence, this witness' testimony cannot be given under any aspect of the case, and is incompetent evidence of any fact stated therein or attempted to be proven thereby. That, in addition to the foregoing reasons, the conversation apparently is for the purpose of introducing in evidence declarations made by Kessler & Company of Manchester in their own favor which would be incompetent and could only be brought in on the theory that this evidence is incompetent because of the right which they have to contradict the testimony given by Henry Kessler.

2561 Mr. Elkus: If the whole of a conversation has not been given by any party to a conversation, the other party to a conversation may be called to give the entire conversation. On that theory alone, this evidence is admissible.

Mr. Larkin: Henry Kessler, the defendant in this proceeding, was asked to give the whole conversation upon the insistence of his counsel, and, apparently, has given the whole conversation.

The Special Commissioner: I will reserve my decision on the question and I direct the counsel to specify what portion of the testimony he wishes to have stricken out, so that the other side can have due notice and in order that the referee may know exactly what part is claimed to be improper.

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Meantime, it is consented by counsel that the counsel for the trustee shall proceed with the cross-examination of this witness, with liberty to move to strike out any testimony within the purview of this motion.

FREDERICK C. McLAUGHLIN (cross-examination resumed) :

By Mr. Larkin :

Q. Mr. McLaughlin, did Mr. Henry Kessler tell you that he had seen Mr. Kissel, or Mr. Kinnicutt,

and had any conversation with them? A. He did not. 2563

Q. Had he said to you that he had been in consultation with anybody else regarding this matter?

A. He did not.

Q. Did he mention Kissel and Kinnicut at all?

A. He did not mention their names.

Q. Or Horace Bacon? A. No.

Q. When he told you that Kessler & Company of Manchester were creditors of Kessler & Company of New York, did he state the nature of his claim against them? A. To the best of my recollection, he did not, as I recall it, but he simply said they were indebted. 2564

Q. Just answer my questions, yes, or no, so far as you can? A. That is what I am trying to do.

Q. Did he say anything about acceptances? A. To the best of my recollection, he did not.

Q. Did he specify the amount that he claimed the New York house of Kessler & Company was indebted to the Manchester house? A. I think he said about a half million dollars.

Q. Did he talk to you about the conditions prevailing in Wall Street at that time? A. I think that I opened that line of conversation and mentioned conditions to him, and that then we did talk somewhat about it.

Q. What conditions did you mention to him? 2565

What did you say to him on that subject? A. I mentioned the fact to him that financial conditions in Wall Street were very bad and that in times such as these one could not tell what bank or what house would fail and that he should take possession of this collateral as a matter of precaution.

Q. Did you mention the fact that the Knickerbocker Trust Company had closed? A. I think probably I did.

Q. Is that your best recollection? A. That is my best recollection.

2566 Q. Did you mention the fact that the Trust Company of America was having a run on it? A. I don't recall whether that run had commenced at that time. I certainly mentioned the general financial conditions that existed in New York at that time.

Q. And you were here in New York at that time? A. Yes, sir.

Q. And kept in touch with the general financial condition, so far as you could? A. Only in a general way. I was a depositor in the Trust Company of America.

Q. You knew about the conditions in a general way in New York at that time? You were here in the City from day to day, weren't you? A. I was.

Q. And you were actively in practice at the time? A. I was.

Q. And you were a depositor in the Trust Company of America? A. I was.

Q. And whatever date it was, you knew that there was a run on the Trust Company of America? A. I did.

Q. And you knew that banks were closing up in this city and in Brooklyn from time to time? A. I did. One of my partners was a depositor in the Knickerbocker Trust Company, and one of my associates had a large amount in the Knickerbocker Trust Company, so I knew all about that.

2568 Q. And did you know of the stringency in the money market? A. I did.

Q. And that, on that very day, on Thursday, the 24th, the Stock Exchange was in great need of money for the purpose of making their clearings? A. Yes; I was reading the papers very carefully, night and morning.

Q. And, as far as you can judge, you gave Mr. Henry Kessler a fair idea of the financial condition at that time, as you understood it? A. I can only say that I mentioned that subject.

Q. Did you give him a fair idea, as you saw the general financial condition at that time? A. I didn't think that that was necessary. 2569

Q. Did you or did you not? A. I don't know what you mean by a fair idea. We talked about it.

Q. I understand you to say, Mr. McLaughlin, that the apparent purpose of Mr. Kessler's visit to you, was on the question of the right of a partner to convey his individual personal property to his wife? A. That was the question he asked me.

Q. It was the question he asked you? A. Yes.

Q. Did he ask you anything about working out some claim in favor of the Kessler estate? A. He did not. 2570

Q. What does he mean by saying that "I was not consulting Mr. McLaughlin at all. I was just asking general advice—how this estate was to be worked out"? A. He certainly did not ask my advice on that subject.

Q. Did Mr. Henry Kessler tell you at that interview, which you say was in the afternoon, that he had seen the securities which he referred to on that day? A. He did not.

Q. Did he tell you that he had received any instructions, or advices from Manchester regarding this escrow, so-called? A. He did not.

Q. Are you counsel for Kissel, Kinnicut & Company in any way? A. I am not, and never have been, and was not acquainted with them at that time. 2571

Q. Did Mr. Henry Kessler consult you about the change in the partners of Kessler & Company, of New York, at that time?

Mr. Elkus: At what time?

Mr. Larkin: The time of this interview.

The Witness: He did not.

Q. When Mr. Kessler told you about this escrow, did you ask him how long this escrow had been in

2572 existence? A. I don't remember whether I did or not.

Q. Did he say anything to you about it? A. I cannot remember that he did.

Q. Did he tell you how long business transactions had been going on between the New York and Manchester houses? A. He may have said something about that, though I cannot remember about that matter.

Q. Did he say anything to you by which you understood that these escrow securities had been established lately or some years back? A. I don't remember whether he told me at that time how long
2573 the securities had been deposited.

Q. Did he tell you that the estate of William Kessler was a creditor of the New York house? A. He did.

Q. And he told you, did he, that his Manchester house was a creditor of the New York house as well? A. Yes, sir.

Q. And he came to you first asking questions regarding the right of the executors of the estate of William Kessler to prevent a member of the New York partnership from transferring property to his wife—is that correct? A. He asked me that one question.

Q. That is the first question he asked you? A.
2574 That is the only question he asked me for legal advice.

Q. Did you ask him why the executors of the Kessler estate were interested in that question? A. I don't remember asking that. He made certain statements that gave me some idea of why they were interested.

Q. Did you ask him? You don't know whether you asked him or he told you that the estate was a creditor of the New York house? A. He told me that.

Q. Then his interest in the question was because

of the estate being a creditor of the New York house? A. That was the interest he stated to me; yes. 2575

Q. And he wanted to know whether the estate, as a creditor of the New York house, would take steps to prevent a partner from disposing of his individual property? A. That was the question, yes.

Q. And he still told you that he believed Kessler & Company, of New York, were solvent, did he? A. He did when I asked him.

Q. And he never said anything to you to the effect that he was afraid that Kessler & Company, of New York, might be insolvent? A. He did not.

Q. Did he explain to you why he was interested in preventing an individual member of the New York house from conveying property to his wife? A. The only answer I can give you to that question is to tell you what he said about Gillett. 2576

Q. And he said that Gillett was conveying his property to his wife—at least, he had heard so? A. Yes.

Q. Did he tell you he had told him that? A. He did not.

Q. Did he tell you how much property Gillett was conveying to his wife? A. I think he mentioned a very large amount.

Q. Well, are you able to specify the amount which he said that Gillett was about to convey to his wife? A. I cannot be positive as to that, for the reason that the amount that I have since heard in this claim has confused the matter. I would not be sure whether I heard that amount at the time I talked with Henry Kessler or whether I heard it since. 2577

Q. What he wanted to know was, in substance, whether or not he, as an executor of William Kessler, could take proceedings to prevent a member of the New York house of Kessler & Company from

3578 turning over his individual property, did he? A. Yes, sir. ,

Q. Now, then, you told him, didn't you, that if Kessler & Company were solvent, the New York firm were solvent, that no proceedings could be taken against Gillett—is that right? A. Yes.

Q. Then I understand you asked him the question whether Kessler & Company, of New York, were solvent? A. I did.

Q. You told Mr. Kessler to take these escrow securities into his possession, didn't you? A. Yes.

Q. Did you tell him to engage a box—to put them in a box? A. I did not.

2579 Q. Why did you urge him to take them in his possession? A. Because I thought that was the safe thing for him to do and the proper thing for him to do.

Q. Why safe? Because I thought he should have them.

Q. Did you reach your conclusion in view of the existing financial condition at that time. A. I was influenced by that fact.

Q. Was that one of the facts? A. That was one of the facts.

Q. What other fact? A. The other I had doubts in my own mind at that moment as to the validity of the securities.

2580 Q. And you gave both these reasons to Mr. Henry Kessler? A. I did.

It is stipulated that a dividend of 12½% has been paid by the liquidator of Kessler & Company, Limited, of Manchester, to the creditors of Kessler & Company, of Manchester, including all the holders of the drafts drawn by Kessler & Company, of New York, on Kessler & Company, of Manchester, and accepted by them, which have been put in evidence, and that said 12½% was paid on or about the 8th day of February, 1908.

It is further stipulated that the counsel for 2581
the trustee shall have the privilege of investi-
gating the fact as stated in this stipulation,
and if he finds that the above is not a fact, he
shall have the right to withdraw from this
stipulation at any time prior to the decision
of this case. In case of such withdrawal, an
opportunity shall be given to Kessler & Com-
pany, of Manchester, to prove by competent
evidence the actual fact.

NEW YORK, February 25, 1908. 2582
11 A. M.

Met pursuant to adjournment.

Same appearances, and :

HENRY D. HOTCHKISS, Esq., for J. & P. Coats,
Limited.

Mr. Hotchkiss: We ask for an adjournment for
a short time.

The Special Commissioner: Motion denied.

ELLIOTT C. SMITH, a witness called on behalf of 2583
Kessler & Company, Limited, being duly sworn,
testified as follows :

DIRECT-EXAMINATION BY MR. ELKUS:

Q. What is your office address? A. 33 Wall
street.

Q. What is your business? A. Banker and
broker.

Q. Dealing in securities? A. Stocks and bonds,
yes.

Q. And have been for how many years? A. For
the last twenty years.

2584 Q. In this city? A. Yes.

Q. And you are familiar with the values and prices of stocks and bonds and securities that are dealt in in New York City and have been dealt in for the past ten years? A. Generally.

Q. And were you appointed one of the appraisers of the bankruptcy estate of Kessler & Company? A. I was.

Q. And have you, as such appraiser, made an inventory of all the assets and property of the estate? A. I have not completed it.

Q. You have made a partial examination? A. Yes.

2585 Q. Have you made a list of the securities? A. Yes.

Q. Which were included in the Kessler & Company of Manchester escrow, so-called? A. I have made an approximate inventory of the securities noted on this paper, which is "special escrow, Kessler & Company, Limited," and headed in that way, and then another one named "general escrow." I don't know whether it is Kessler of Manchester, Limited, or not.

Q. That paper is an exhibit, I think, of Kessler & Company, Limited? A. Yes, sir.

2586 Q. And have you, in the course of your official duties, appraised the value of the securities held in these two escrows, the list of which you have produced? A. I have made with my associate appraisers, an approximate appraisal. It is not yet in completed form to turn in, but it is an approximate appraisal.

Q. Is it such an appraisal as you are able to testify about? A. It is in such form that I can testify.

Q. As to the valuation? A. Yes.

Q. As of what date do you make such valuation? A. As of to-day. I would be willing also to have that cover any previous date within the last three months or four months.

Q. Whatever your valuation is to-day, it is about ²⁵⁸⁷ the same for any time during the last four months?

A. Yes.

Q. To be more specific it would cover the dates between October 25th and October 30? A. Approximately.

Q. What was the value of the securities—the market value of these securities—in your opinion, between October 25th and October 30th, 1907, both dates inclusive?

Mr. Larkin: I object to the question on the ground that it is immaterial and irrelevant; that if Kessler & Company, of Manchester, have a valid lien, the question of the value of the securities on ²⁵⁸⁸ the 25th of October or the 30th of October, is immaterial. If their lien is invalid, then the question of the value of the securities is immaterial, so far as they are concerned.

The Special Commissioner: Objection overruled.

Mr. Larkin: Exception.

A. The securities that we have approximately appraised at the present date are \$25,000 Orleans County Quarry Company 6s; a \$16,000 note of Milne, Turnbull & Company; a \$7,000 note of Milne, Turnbull & Company; a \$17,000 note of Milne, Turnbull & Company; a \$5,000 promissory note of ²⁵⁸⁹ R. B. MacLea Company; 466 shares of Cripple Creek Central Railway Company preferred; 300 shares of Cripple Creek Central Railway Company common; 2,428 shares of the United Lighting & Heating Company stock; 1,341 shares of Daimler Manufacturing Company preferred stock; \$56,000 United Breweries Company 6s; \$50,000 United Breweries Company promissory notes; 1,000 shares of the Underground Electric Railway Company, of London, £10 each; 2,000 shares of the Underground Electric Railway Company of London Trust Certificates; 70 shares Standard Roller Bearing Com-

2590 pany common stock; 100 shares Standard Roller Bearing Company preferred stock; 10,000 Elkton Mining Company; 1,000 shares United States Reduction & Refining Company common; 500 shares United States Reduction & Refining Company preferred; \$45,000 Pittsburg, Westmoreland & Somerset 5s; \$12,000 Indiana, Columbus & Eastern Traction Company 5s; 288 shares Muskogee Gas & Electric Company common; 288 shares Muskogee Gas & Electric Company preferred;

\$22,000 Muskogee Gas & Electric Company refunding 5s; \$10,000 mortgage Bedford avenue property, Brooklyn; \$40,000 syndicate subscription to
2591 Western Pacific Railway Company 5% bonds, on which has been paid in \$7,234.28; 548 shares Chicago, Great Western preferred stock B; \$20,000 Orleans County Quarry Company 6s.

I would not like to give these figures as the final and positive determination of the appraisers, because there are some of the things we have not fully investigated. In my opinion, the appraisal may be a little higher than it should be. I have not completed it, but, taking that Bedford avenue property mortgage at \$10,000, our appraisal is \$236,495—subject to revision.

Q. Your revision, if anything, would reduce it?

2592 A. I think so. That is my opinion.

By the Special Commissioner:

Q. Does that lump the whole thing? both—

A. That is only counting for the Bedford avenue property—

By Mr. Elkus:

Q. But with that \$21,000 for the Bedford avenue property? A. That would be \$257,495.

Q. Those are outside figures? A. Those are outside figures, yes, sir. In my opinion, any further revision would reduce it.

Q. Give the valuation, as near as you can, at the 2593 present time? A. For the aggregate?

Q. For the aggregate of the securities in what is called the "special escrow for £20,000."

Mr. Larkin: I want to renew my objection to this testimony on the same grounds as before, and I move now to strike out all the testimony given by the witness as to the valuation of any of the securities contained in any of these questions, on the ground that it is irrelevant and immaterial.

The Special Commissioner: I entertain the motion, but deny it and give you an exception.

The Witness: I estimate the value of the securities in the special escrow at the present time as 2594 \$48,300. I may want to revise my opinion later.

Q. By "at the present time," you mean that was their value as of October 25th and October 30th?

A. That would have been my appraisal at that time, also under like circumstances.

Q. You say you may want to revise your valuation. Your revision—would that make them lower or higher? A. My present opinion is it would make them lower.

Q. That is, make the valuation lower? A. I think so.

CROSS-EXAMINATION BY MR. LARKIN:

2595

Q. You are, I suppose, giving your best judgment as to the market for these securities on those dates between the 25th and the 30th of October? A. I am.

Q. The realization of the value of those securities would depend somewhat upon the management of them? A. I think it will be dependent a great deal upon that.

By Mr. Elkus:

Q. I presume that the failure of Kessler & Company would have a great deal to do with the value

2596 of these securities? A. In a very great many instances, yes.

By Mr. Larkin:

Q. In giving your appraisal of the value of these securities, you have assumed, I presume, the value of the Brooklyn real estate at \$31,000 as the value of the equity? A. That I took from the information that has been given me here.

Q. What valuation did you put on the Daimler stock? A. Ten cents on the dollar.

Q. What valuation did you put on the United Breweries?

2597

Mr. Elkus: Bonds or notes?

The Witness: 70 per cent.

Q. Bonds? A. Both bonds and notes. The notes, I believe, are convertible into bonds, or there is some arrangement of that sort.

Q. What on United Lighting and Heating Company stock? A. A nominal price of \$1 a share.

Q. And the Underground Electric? A. A nominal figure there, also.

Q. They are now re-organizing? A. Yes.

Q. The Elkton Mining Company? A. Twenty-five cents a share.

2598 Q. The United States Reduction & Refining Company? A. \$4 for the common stock, \$16 for the preferred.

Q. Per share? A. Per share.

Q. The Pittsburg, Westmoreland & Somerset Railroad 5% bonds? A. 20% of par.

Q. And the Indiana & Columbus? A. 80%.

Q. The Muskogee Gas & Electric? A. For the common stock, \$1 per share; for the preferred, \$10; for the bonds, 70%.

Q. What valuation did you put on the subscription for the Great Western syndicate? A. 85% of the amount paid in.

Q. And the Chicago Great Western stock, Series 2599 B? What did you value that? A. 5%.

Q. What about the Orleans County Quarry bonds? What did you value them? A. I have put in 80. I don't think they are worth possibly that much. I put them in for the time being for a temporary appraisal. That is one of the things subject to revision. And, as you asked me, it makes quite a difference in the way in general it is looked at, whether you get more or get less.

It is admitted that petitions for their adjudication as involuntary bankrupts were filed against Milne, Turnbull & Company on the 11th day of November, 1907, and on the 19th ²⁶⁰⁰ day of November, 1907.

[BOTH SIDES REST.]

Owing to the application made by Mr. Hotchkiss, representing J. & P. Coats, Limited, the Special Commissioner directs that the matter stand over until March 3, 1908, at 11 A. M.

OFFICE OF THE REFEREE,

No. 68 William Street,

New York, March 10th, 1908; ²⁶⁰¹

11:00 A. M.

Present:

Mr. LARKIN, Attorney for the Trustee;

Mr. ELKUS, Attorney for Kessler & Co.,
Limited;

HENRY D. HOTCHKISS, Esq., of Counsel, for J.
& P. Coats, Limited.

It is conceded by all parties to the controversy that the four drafts of Five Thousand Pounds each, drawn by Messrs. Kessler & Co. upon Kessler & Co.,

2602 Limited, of Manchester, were on the 27th day of August, 1907, purchased by Messrs. J. & P. Coats, Limited, from Messrs. Kessler & Co., to whom on the same day Messrs. J. & P. Coats, Limited, paid as consideration for said drafts the sum of \$97,550., the same being paid to Messrs. Kessler & Co. by the checks of the Spool Cotton Company, the agents of Messrs. J. & P. Coats, Limited.

OFFICE OF THE REFEREE,

No. 68 William Street,

2603

New York, March 11th, 1908;

3:30 P. M.

Met pursuant to adjournment.

Same appearances; and

HENRY D. HOTCHKISS, Esq., of Counsel for J.
& P. Coats, Limited.

It is conceded that the four drafts for Five Thousand Pounds each referred to in the stipulation entered on the minutes at the last hearing are still the property of Messrs. J. & P. Coats, Limited, and
2604 produced by them at this hearing.

Mr. Hotchkiss: Each of these drafts bears the following endorsement: "December 4th, 1907, dividends paid by liquidator of Kessler & Co., Limited, in liquidation, first of 2 shillings, 6 pence, with check for 625 pounds, 2 shillings, paid February 7th, 1908." I suppose that whatever equities we have here are subject to those payments.

Mr. Larkin: I don't see any point in reading that into the minutes. I suppose Mr. Hotchkiss ought to admit that the money mentioned on the back of those drafts has been received by his client.

The Referee: He admits that, that the dividend

on each draft to J. & P. Coats has been received by²⁶⁰⁵ them.

Mr. Hotchkiss: There is a difference of a few pence, to equalize the percentage payment probably, in the amount of the payment on each draft, but it is practically 625 and 2 on each draft.

ALFRED KESSLER, recalled by J. & P. Coats, Limited, testified as follows:

DIRECT-EXAMINATION BY MR. HOTCHKISS:

Q. Mr. Kessler, by whose direction was the escrow of August 27th, 1907, created? A. By mine.

Q. Who selected the securities to go into that²⁶⁰⁶ escrow? A. I did.

Q. What did you do? A. I told MacGie to set them aside and put them in the Manchester escrow.

Q. Did you make any list of them? A. I probably made a list of them and handed Mr. MacGie.

Q. On what date? A. I don't know.

Q. You mean your present recollection will not enable you to state what date? A. I don't know what date. It is down there, I suppose. According to that letter, I suppose it must have been the 27th of August.

Q. I show you a copy of your letter to Kessler & Co., Limited, dated August 27th, advising the creation of this escrow, and ask you if that re-²⁶⁰⁷freshes your recollection as to the date? A. Yes, that is all right.

Q. That is the date on which you handed the list to Mr. MacGie? A. Unless the typewriter has made a mistake.

WILLIAM A. MACGIE, recalled by J. & P. Coats, Limited, testified as follows:

DIRECT-EXAMINATION BY MR. HOTCHKISS:

Q. Mr. MacGie, what, if any, instructions did you receive from Mr. Alfred Kessler on the 27th

2608 of August, 1907, in respect to a special escrow in favor of Kessler & Co., Limited? A. I was instructed to take certain notes and bonds and set them aside in an envelope, to be marked as Special Escrow of Kessler & Co., Limited, 20,000 Pounds.

Q. Was any list of the securities covered by your instructions given to you? A. I think that Mr. Kessler either handed me a written list or in conversation told me what notes and bonds to take.

Q. What did you do in pursuance of these instructions? A. I took the notes and bonds and put them by themselves; according to my best recollection, made out an envelope specifying what they
2609 were, marked it "Kessler & Co., Limited, Special Escrow, 20,000 Pounds," and handed it to Mr. Albert Kessler to be put aside in the safe deposit vault.

Q. Were the securities so placed in this envelope the securities covered by the list you had received from Mr. Alfred Kessler? A. I know they were the securities. Either he gave me a list or told me; I am not positive about a written list, but I think he did give me a written list.

Q. Your firm, as I understand it, kept in the usual course of business a book called the loan book? A. A book that we called the loan book; yes, sir.

2610 Q. I show you Receiver's Exhibit No. 12 at page 154, and ask you who made the entries recorded at that place? A. I made them all, with the possible exception of a few figures. I think those figures (indicating) are in another handwriting.

Q. By the phrase "a few figures," do you refer to the figures following the entry of September 20th, 200 Cripple Creek common B, 172-3, 67, \$13,400? A. The figures I refer to are the 67, the dollar mark, and the 13,400 twice. I am not sure about the second one. The first one I am sure is not in my handwriting.

Q. On what date were these several entries made? I am referring to the entries on page 154 of the loan book. A. The entries down to the footing, where it foots 107,000, were made either on August 27th or the following day, probably on August 27th.

Q. In other words, all of the entries down to the date September 20th were either made on August 27th or the following day? A. If I may correct my testimony, to say the original entries. The original entries were made on August 27th or 28th.

Q. By original entries, you mean entries down to the entry of September 22nd, except the erasure marks? A. September 20th; yes, I do. 2612

Q. And there are some entries made on the margin of the entry of August 27th—out September 20th, out October 10th, out September 27th. Who made those entries? A. I did.

Q. When? A. As nearly as I can recall, upon the dates named.

Q. Can you from your recollection swear that you personally took this envelope in which these securities referred to under the date of August 27th had been placed, to the vault? A. My recollection is that I did not take it to the vault.

Q. And what did you do? A. Handed it to Mr. Albert Kessler, or told him it was in the box, and requested him when he took the box over to the vault, to place this envelope with the securities on the shelf in the vault. 2613

Q. Mr. MacGie, what were the endorsements upon the envelope in which these securities were placed on August 27th?

Mr. Larkin: He has already testified to that.

A. My recollection is, as I have already stated, that they were marked, "Special Escrow, Kessler & Co., 20,000 Pounds."

Q. Kessler & Co., Limited? A. Probably the word "Limited" on.

2614 Q. Who was referred to by the term of Kessler & Co.? A. Kessler & Co., Limited, were referred to, I think the word "Limited" was on, but I would not like to swear to it.

Q. Did you at any time afterwards see this original envelope in the vault? A. Yes, sir.

Q. Do you recall the occasion? A. No, sir.

Q. Can you recall approximately how soon after August 27th it was? A. I cannot.

Q. Can you recollect approximately how long before the failure? A. I cannot.

Q. But it was while the securities were in this original envelope? A. Yes, sir.

2615 Q. And in what part of the safe did you see them? There were two shelves in the safe; they lay on one of the shelves.

Q. Which shelf? A. I think the upper.

Q. The upper one? A. I think the upper one; I am not positive.

Q. In association with what class of securities with regard to ownership? A. We had a box that we brought from the safe deposit vault to the office every day, in which all current securities were kept. On these shelves of the safe deposit vault, securities that were not likely to be needed from day to day were kept. I cannot be more specific than that.

2616 Q. Was not this shelf also the place of deposit for securities not wholly belonging to Kessler & Co.? A. There were securities there belonging to customers of Kessler & Co.

Q. Do you recollect the circumstances under which there were some substitutions made in the original collateral of August 27th? A. I recollect in a general way there were substitutions made.

Q. What entries were made with regard to these substitutions? A. Where?

Q. In the loan book of Kessler & Co.? A. There are entries that are made here that refer to such substitutions.

Q. Were any of them made by you? A. I made²⁶¹⁷ them all.

Q. And at what time with respect to the dates of these occurrences are the entries in your loan book? A. As far as I can recall, they were made on the same day.

Q. What was the first substitution? A. There was notes of the Orleans County Quarry Company for \$20,000, with first mortgage bonds attached, taken out September 20th, and Cripple Creek stock placed in the place, common and preferred stock.

Q. 200 shares of each? A. Yes; 200 shares of each.

Q. What was the next substitution? A. On Sep-²⁶¹⁸tember 27th there was withdrawn notes of the R. B. MacLea Company aggregating \$15,000.

Q. One of eight and one of seven? A. One of eight and one of seven; and there was substituted in the place of that 166 shares of Cripple Creek Central Railway preferred stock and 100 shares of the common stock.

Q. And what was the third substitution? A. A note of the Orleans County Quarry Company for \$4,775, with first mortgage bonds attached was withdrawn, and 100 shares of Cripple Creek Central Railway preferred stock was substituted.

Q. This occurred when? A. October 10th.

Q. What part did you have in the physical act²⁶¹⁹ of substitution? A. I took the Cripple Creek Central stock and either withdrew the notes from the envelope and put the stock in, or requested Mr. Albert Kessler to do so. Most cases I requested Mr. Albert Kessler to do so. Possibly I may have done it myself on one occasion. Always took the Cripple Creek stock and handed it to him, if I did not myself place it in the envelope.

Q. It was part of his duty to obey these directions? A. He was the one that went to the vault with the box from day to day, and as this envelope

2620 was in the vault I would naturally give him the stock and request him to put it in the envelope.

Q. And from whom did you receive your instructions to make these substitutions? A. Mr. Alfred Kessler.

Q. And by whose hand was the erasures in the original collateral made on the loan book when the substitutions took place? A. Mine.

Q. Were any part of the original collateral of August 27th retained outside the envelope and fastened to it, rather than being placed within the envelope? A. I don't recall, but probably the bonds were outside the envelope, quite a bunch of bonds.

2621 Q. How many bonds were there, do you recollect? A. In all there must have been some fifty-eight; twenty-five bonds specifically by themselves, and the others attached to the notes of the Orleans County Quarry Company.

Q. Whereabouts with respect to the envelope were the promissory notes which were included in the collateral? A. Inside.

Q. And the stock? A. Inside the envelope. I am not positive about the bonds; they may have been forced in the envelope, but I think not.

2622 Q. Was the original envelope with the collateral contained in it ever brought back from the vault to the office of Kessler & Co. after August 27th, to your knowledge? A. I think not, but my recollection is not positive.

CROSS-EXAMINATION BY MR. LARKIN:

Q. Mr. MacGie, I don't understand that in your testimony to-day you have changed any of the testimony that you heretofore given in this matter? A. No, sir.

Q. And when changes were made in this collateral, were not the changes made in the office rather than over in the safe deposit vault? A. Not as a rule. That envelope may have been

brought over on one occasion. My memory is vague 2623
on that point.

Q. You stated, Mr. MacGie, that Mr. Alfred Kessler told you to take out those securities; do you remember? A. Yes, sir.

Q. When he told you that, these securities were in the box which was carried back and forth from day to day between the vault and the office, were they not? A. I think not, as regards the bonds.

Q. Where were the bonds? A. Over in the vault.

Q. And as regards the notes, were they carried back and forth? A. Yes.

Q. From day to day? A. Yes, sir. 2624

Q. Where were the bonds kept over there? A. On one of the shelves which I mentioned.

Q. Either on the upper or the second shelf? A. Yes, sir.

Q. So the notes and the stock, when the stock was put up subsequently, was taken from the box that was carried back and forth from day to day? A. Yes, sir; the notes and the stock. The stock was not put in at the original date. The notes were taken from the box originally when they were put in the escrow.

Q. You think in regard to the quarry bonds they were taken from one of the shelves and put with the others, and then the whole was put back on one of these two shelves? A. That is my recollection. 2625

Mr. Elkus: What do you mean by the whole?

Mr. Larkin: The whole bunch.

Q. The whole bunch of collateral was put back on the first or the second shelf? A. If I may answer that question by telling my recollection of just what was done, I would prefer to do it.

Q. Go ahead. A. My recollection is that I took the notes, put them in a smaller envelope with a written statement of what they were and when

2626 they were due, put them in the larger envelope which I had marked, either took them personally to the vault or gave them to Mr. Albert Kessler and requested him to take the Orleans County bonds which lay in the vault, telling him from what package he was to get them, and put them in the envelope, and put the whole on the shelf.

Q. Now, Mr. MacGie, as I understand, the third compartment in the safe was occupied by this big box which was carried back and forth from day to day, and the remaining two compartments were used for the securities which you say were not in use every day at the office; is that correct? A.

2627 Securities and some other papers.

Q. Which were not in daily use at the office; and these securities, some of them were Kessler & Co's and some belonged to customers, and they were put in the remaining two vaults? A. Not two vaults; two shelves.

By Mr. Hotchkiss:

Q. Mr. MacGie, on page 416 and 417 of the record this question was asked you: "Q. You ordered Bertie Kessler to take the bonds out of the safe deposit box and put them with the envelope? A. My recollection is that I did it myself"? A. I say my memory is vague; I cannot say positively.

2628 That is some months nearer the event, and is probably the better memory.

Q. Later, at page 417, you say there were other bonds of the same kind, and you took thirty-three of the kind specified in escrow and endorsed on the envelope and placed them with the envelope? A. Thirty-three bonds belonged with the Quarry Company notes. Now that you have called my attention to that fact, I think that I remember to go to the vault and take them out myself because Mr. Albert Kessler was not quite as familiar with the packages. Twenty-five bonds were a separate matter.

Mr. Elkus: I understood his testimony before ²⁶²⁹ was that he did it all personally?

The Witness: I think that is correct.

Mr. Elkus: And your attention now being called to your previous testimony, you say that you did put the securities with the escrow yourself and then placed them in the envelope on the top shelf?

The Witness: I think that is correct.

Mr. Elkus: Then Mr. Albert Kessler had nothing to do with it?

The Witness: That is my present recollection, as my attention has been called to my former testimony.

ALBERT KESSLER, called as a witness on behalf of J. & P. Coats, Limited, being duly sworn, testified as follows: ²⁶³⁰

DIRECT-EXAMINATION BY MR. HOTCHKISS:

Q. Mr. Kessler, have you been sitting here while Mr. MacGie testified? A. No, I just come.

Q. Do you recollect the circumstance of the special escrow of August 27th, 1907, in favor of Kessler & Co., Limited? A. I recollect that there were special securities set aside.

Q. What did you have to do with the deposit of those securities, if anything, in the vault? A. I ²⁶³¹ think the first escrow—I mean the special escrow—I did not make the first deposit of the special escrow. Simply a matter of memory; I don't remember.

Q. Do you recollect what, if anything, you did with regard to the substitutions which were made for the original collateral deposited for this special escrow, August 27th? A. I don't carry in my head the substitutions and the dates.

Q. I call your attention to the entry in the loan book under September 20th, 200 shares of Cripple Creek common and 200 shares of Cripple Creek

2632 preferred, and ask you if you recall whether you made that substitution? A. To the best of my recollection, I made that substitution.

Q. What did you do? A. Mr. MacGie gave me the stock generally when I went out to lunch——

Q. What did you do about this—not generally? A. The 200 shares common and preferred I put into the envelope marked “Special Escrow” in the vault.

Q. And what did you take out, if anything? A. Whatever is marked in the loan book as taken out.

Q. And what about the substitution of September 27th, 166 shares Cripple Creek Central preferred and 100 shares Cripple Creek Central common? A. I placed them in the Special Escrow on September 27th.

Q. And took out—— A. Whatever was taken out.

Q. And what about the substitution of October 10th? A. I placed in the Special Escrow 100 shares Cripple Creek Central preferred.

Q. On these dates where did you find the envelope, and where did you replace it? A. On the top shelf of the safe deposit box in the North American Safe Deposit Company.

Mr. Hotchkiss: I would like to have the record
2634 show that Messrs. J. & P. Coats, Limited, except to the ruling of the Referee made at the hearing of the 7th of December, 1907, excluding the envelope and entries thereon marked Exhibit G for identification as of that date.

The Referee: Certainly. I don't see any objection to that.

Mr. Larkin: I understand that the case is rested by Messrs. J. & P. Coats and that we are all through.

[CASE CLOSED.]

641

SUMMARY OF DEBTS AND ASSETS.

[FROM THE STATEMENTS OF THE BANKRUPT IN SCHEDULES A AND B.]

Schedule A.	1 (1)	Taxes and debts due United States	
" "	1 (2)	Taxes due States, counties, districts and municipalities	
" "	1 (3)	Wages	
" "	1 (4)	Other debts preferred by law	
Schedule A.	2	Secured claims	\$2,414,537 83
Schedule A.	3	Unsecured claims	1,403,723 36
Schedule A.	4	*Notes and bills which ought to be paid by other parties thereto. Hence contingent liability	5,807,363 02
Schedule A.	5	Accommodation paper	
Schedule A, total			\$9,625,624 21

642

Schedule B.	1	Real estate	\$35,000 00
Schedule B.	2-a	Cash on hand	1,641 83
" "	2-b	Bills, promissory notes and securities	152,499 38
" "		*Notes and bills, etc., offsetting contingent liability shown by Schedule "A" 4.	5,807,363 02
" "	2-c	Stock in trade	
" "	2-d	Household goods, &c.	
" "	2-e	Books, prints and pictures	
" "	2-f	Horses, cows and other animals	
" "	2-g	Carriages and other vehicles	
" "	2-h	Farming stock and implements	
" "	2-i	Shipping and shares in vessels	
" "	2-k	Machinery, tools, &c.	413 70
" "	2-l	Patents, copyrights and trade-marks	
" "	2-m	Other personal property	71,005 25
Schedule B.	3-a	Debts due on open accounts	998,601 03
" "	3-b	Stocks, negotiable bonds, &c.	2,273,715 53
" "	3-c	Policies of insurance	
" "	3-d	Unliquidated claims	
" "	3-e	Deposits of money in banks and elsewhere	18,860 40
Schedule B.	4	Property in reversion, remainder, trust, &c.	
Schedule B.	5	Property claimed to be excepted	
Schedule B.	6	Books, deeds and papers	
Schedule B, total			\$9,359,100 14

* In case these bills and notes, etc., are not paid by makers or acceptors, etc., at maturity a contingent asset and liability ensues for petitioner.

(Endorsed)—Schedules.—Filed Dec 26, 1907.

Letters giving particulars of securities held in 2644
escrow by Messrs. Kessler & Co. of New York.

KESSLER & Co. Bankers,
No. 54 Wall Street,
New York
June 30 1903.

Per S. S. "Oceanic."

MESSRS. KESSLER & CO. LIMITED,
Manchester.

DEAR SIRS:—

In accordance with instructions from Mr. Alfred Kessler we have today placed in a separate package in our safe deposit vaults the following securities, 2645 package marked, "Escrow for account of Kessler & Co., Limited, Manchester:"

1484 shares Oklahoma Gas & Electric Co.	
at 25	\$37,100.
2428 shares United Lighting & Heating	
Co., at 12	29,136.
2352 shares Daimler Manufacturing	
Company, at 50	117,600.
\$373,000. United Breweries Co. first 6s, at	
65	242,245.
	<hr/>
	\$406,081.

This escrow is intended as a protection against 2646
our long drawings against your good selves.

Kindly confirm if in order, and oblige,

Yours very truly,

KESSLER & Co.

8th JULY 3.

MESSRS. KESSLER & Co.
New York.

DEAR SIRS,

We are in receipt of your favor of 30th ultimo
in which you advise us of the securities you have

2647 laid aside as security for your long drawings on us. We have noted the particulars as given up to us and the matter goes in order.

If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality.

We have also your letter of the same date advising two cheques for, respectively:

£415 : 9 : 2 and £403 : 0 : 11.

on account of interest due to the estate of Wm. Kessler. These we have handed to Mr. P. W. Kessler as Executor of the estate.

We are, dear Sirs,

Yours very truly,

P. W. KESSLER.

Private

23rd Dec.

3.

MESSRS. KESSLER & Co.,

New York.

DEAR SIRs,

2649 For the purposes of the audit of our books for our yearly balance sheet, we should feel obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against your drawing credit with us. We should like this done annually on the 31st December.

We do not think the matter will present any difficulty for you. Something in the form of the enclosed is what we require.

Thanking you in advance

We are, dear Sirs,

Yrs truly,

P. W. KESSLER.

We certify that we have specially set aside and hold for your acct on this the 31st day of December

/03 as security for the drawing credit which you 2650
accord us, the following securities.

Name secs and market value

KESSLER & Co.

Bankers

54 WALL STREET,
NEW YORK 1 JAN 1904.

MESSRS. KESSLER & Co. LIM

Manchester

DEAR SIRs,

We certify that we have specially set aside and
hold for your account on this the 31st day of De- 2651
cember 1903, as security for the drawing credit
which you accord us, the following securities:

21/3/04

1484 shares Oklahoma Gas & Electric at	
25	\$37,100.
2428 shares United Light & Heating at	
10	24,280.
2352 shares Daimler Mfg Co. at 50.....	117,600.
\$36,000 United Brewery New 1st 6%	
bonds at 100	36,000.
\$50,000 United Brewery New 1st 6%	
notes at 100	50,000.
\$134,800 Certificate of payments to	
Trust Co. on a c 1st Mortgage	2652
bonds of Chicago & Gt. Western	
R.R. at 89	119,972.
1348 Shares Com. Stock C. Gt. W. at 15	20,220.
	<hr/>
	\$405,172.

You hold in addition to this

1606 Shares United Lighting and Heat	
at 10	16,060.

\$421,232.

KESSLER & Co.

2653 Private

20 Jan'y 4.

MESSRS. KESSLER & Co.
New York.

DEAR SIRs,

We are in receipt of your favor of 1st Jan'y, in which you give us particulars of the securities you hold in escrow for us against your drawing credit with us. The same are noted.

Should you, in the course of the year, through sale or otherwise, have occasion to vary that deposit, we should feel obliged by your advising us forthwith.

We are, dear Sirs,
Yours very truly,
P. W. KESSLER.

KESSLER & Co. Bankers,
No. 54 Wall Street,
New York Feb 12th 1904.

p. "New York"

DEAR KESSLER,

2655 Alfred left early yesterday morning for Washington to-day being Lincoln's Birthday; he won't be back before Monday. He told me to write to you, to say that he has set aside for you in the usual way the following securities

\$98,000 D and S. W. 5s at 36	\$35,280.
(of which \$36,000—only are our own the rest being collaterals from others)	
Note of C. H. Devlin, endorsed by W. K. Gillett	25,000.
200 shares Alliance Realty Co. at 92....	18,400.
	<hr/> \$78,680.

Of the drafts of £20,000 drawn on you yesterday ²⁶⁵⁶
 £5000 were on our regular account with you and
 £15,000 on the emergency account. I am glad you
 accepted our request for the additional accommo-
 dation, and was glad to see that the cablegram
 which Alfred gave me to send off to you on Tues-
 day night (he ding out that evening) was clear to
 you; Alfred did not want to make it so long, but
 I felt you should have rather complete facts at
 once. I saw him writing to you on Wed. so pre-
 sume you've got all the facts.

We cabled M200,000.— to Bremen on Wed. and
 M300,000.— yesterday, and have offered to pay the
 balance of the drafts on Monday also at Bremen, ²⁶⁵⁷
 unless the Deutsche Bank agree to intervene by ac-
 ceptance of the drafts. We expect their answer as
 to this to-morrow morning.

I am going to write a few lines to Alfred now.
 All the morning I was busy with letters to the
 Deutsche Bank and to the Dresdner Bank.

With kind regards

Sincerely yours
 RUDOLPH E. F. FLINSCH.

Sat. Mrg.

Deutsche Bk say they would prefer cable remit-
 tance, so we send them to-day by wire M500,000.—
 more.

2658

KESSLER & Co.
 Bankers.

54 Wall Street,
 New York 16 Feb. 1904.

MESSRS. KESSLER & CO. LIM.
 Manchester.

DEAR SIRS,

In regard to our Mr. Flinsch's letter of 12 Feb.
 to your Mr. P. W. Kessler wherein we named fur-

2659 ther securities placed in your escrow for a further drawing of

£15,000 90 d/s, we to-day have drawn

£10,000 60 d/s (could not sell 90's) and have added to your escrow as security for this drawing
Balance of 12 Feb escrow more than

amount of draft \$6,000.—

Den & S. W. Tax receipt, which is ahead
of all bonds, floating debt and
claims against Co. 25,073.81

\$16,850 Certificate of 10% payment on
a/c 1st Mort Bonds Chicago & Gt.

W. at 89 14,996.50

£660 168-1/2 shares com. stock C. G. W. at 15.. 2,527.50

\$48,597.81

Yours truly,

KESSLER & Co.

Private

26 Feby. 4.

Messrs. KESSLER & Co.

New York.

DEAR SIRs,

2661 We note from your favor of 16 inst. and from Mr. Flinsch's letter to the writer of the 12th, the securities that you have set aside as escrow to protect the extra drawings that we have authorized you to make upon us, the amount to date being £25,000.

Yours truly,

KESSLER & Co., LIMITED.

P. W. KESSLER, Director.

KESSLER & Co.
Bankers.

2662

54 Wall Street,
New York, 8 March, 1904.

MESSRS. KESSLER & CO., LIM.
Manchester.

In regard to escrow of 12 Feb., we have taken out
20,000 D. & S. W. Bonds at36 7,200
200 shares Alliance Realty 18,400

\$25,600

and placed in same
1000 shares (£5 paid) Underground Electric of 2663
London, plus
2000 do Beneficial Interest .. \$25,000
Yours truly,

KESSLER & Co.

KESSLER & Co.,
Bankers.

54 Wall Street,
NEW YORK, 8th March 1904.

MESSRS. KESSLER & CO. LIM.
Manchester.

DEAR SIRS, 2664

We have further placed in your escrow Note
for \$25,000 5% interest bearing and Profit sharing
due 1908 in the £6,000,000 Underground Electric
Railways Co. of London Syndicate expiring Nov.
1, 1904 with option of renewal 6 months. Those
notes have Int. Coupons June and Decb. This col-
lateral is to go against our drawing of £5,000 of
March 1st.

The writer has had a dreadful time of it with a
large abscess and only got back to business yester-
day, still feels very weak and has lost 7½ lbs. in
weight in 2 weeks.

2665 Gillett got back Saturday on the Lucania, not
having achieved anything on a/c of war.

Yours truly,

KESSLER & Co.

KESSLER & Co.
Bankers.

54 Wall Street,
NEW YORK 21 March 1904.

Messrs. KESSLER & Co. Lim.
Manchester.

DEAR SIRS,

2666 Having sold our Oklahoma Gas & Electric Stock
we have withdrawn from your escrow of 1st Jan.
1904 1484 Shares \$37,100.
and to-day placed in same

\$20,000 United Brewery

bonds \$20,000.

"16,850 Certificates of
last and final 10%
payment on a/c of
Chicago & Gt. West-
ern 1st Mort. bonds
at 89

14,996.50

168½ shares Com. C. &

2667 Gt. W. 15 2,527.50

\$ 37,524.

Yours truly,

KESSLER & Co.

Private

2668

29th MARCH, 4

MESSRS. KESSLER & Co.,
New York.

DEAR SIRs,

We note from your favor of 21st inst the alteration made in our escrow, list of 1st January /04, by the withdrawal of

1484 shares Oklahoma Gas & Electric Co. value \$37,100 and the substitution therefor of \$20,000 United Brewery Bonds and \$16,850 Cert of payment of call on C. & Gt. W. Bonds and 168½ shares C. & Gt. Wt. common of a combined value of \$37,524. 2669

The foregoing is in order.

Yours very truly,

KESSLER & Co. Limited

P. W. KESSLER, Director.

KESSLER & Co.
Bankers.

54 Wall Street,
NEW YORK, 22 April 1904

MESSRS. KESSLER & Co. Lim.
Manchester.

DEAR SIRs,

2670

Please take note that Devlin paid off \$5,000 on his note of \$25,000 giving new note for \$20,000.

We have also sold \$2,000 of the \$25,000 London Underground notes.

To replace those, \$7,000 in your escrow we have placed 700 shares Medina Quarry Co. at 10, \$7,000.

Yours truly,

KESSLER & Co.

2671 *Private*

MAY 3rd 4.

MESSRS. KESSLER & Co.,
New York.

DEAR SIRS,

We have your private lines of 22nd ulto and take note of the alteration made in our escrow, by the change in the Devlin note from \$25,000 to \$20,000 and by the sale of \$2,000 of the \$25,000 London Underground notes. Also that these reductions are replaced by 700 Medina Quarry Shares at 10.

Yours truly,

2672

KESSLER & CO. LIMITED.
P. W. KESSLER, Director.

pr "Lucania"

Recd. 3rd Sept. /04.

KESSLER & Co.
Bankers.

54 Wall Street,
New York, 26 Aug., 1904.

2673 Messrs. KESSLER & Co. Lim.
Manchester.

DEAR SIRS,

The Denver & S. Western Tax receipt for \$25,073.81 has been paid off with interest at 6%, so we have taken it out of your escrow and replaced same by increase in value of Chicago Gt. Western syndicate, which agreement now calls for

\$222,450.— 1st Mortgage divisional bonds, which ought to be worth 2674

	80	\$177,960
and 750 shares at.....	15	11,250

	189,210
former value given you.....	175,230

Increase	13,980
and Equipment note of Midland Terminal R. R. At 6%	13,000

(nothing ahead of this note)	\$26,980
-----------------------------------	----------

Yours truly, 2675
KESSLER & Co.

Private

6 Sept. 4

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We are in receipt of your private lines of 26th Augt. and note the alteration made in the securities deposited against our acceptances, which appear to be in order.

We are, dear Sirs,

2676

Yours truly,

KESSLER & Co., LIMITED.

P. W. KESSLER, Director.

2677 pr "Majestic"

KESSLER & Co.
Bankers.

54 Wall Street,
New York, 13 Sept., 1904.

Messrs. KESSLER & Co. Lim.
Manchester.

DEAR SIRs,

2678 Having sold some more of the St. L. and San
Frisco $4\frac{1}{2}$ 5 year notes which we were carrying
through our long drawings on Anglo Foreign, we
have taken out of your escrow part of the C. Gt.
West Del Est. syndicate certificates leaving in your
escrow certificate calling for

\$59,320 Bonds at 80.....	\$47,456
200 Shares stock at 15.....	3,000
We have further added to your escrow	
Note at 6% of Col. Trading & T. Co.....	30,000
Note at 6% Florence & Cripple Creek R. R. Co.....	33,000
Participation Cin. Ham. & Dayser 1 year loan pref. stock as Collateral.	45,000
\$34,000 St. L. & S. F. $4\frac{1}{2}$ % 5 y notes at 92.....	31,280

2679

\$189,736

Yours truly,
KESSLER & Co.

Private.

23 Sept. 4.

Messrs. KESSLER & CO.,
New York.

DEAR SIRS,

Your private lines of the 13th inst are duly to hand, and we take note of the new alteration in our escrow as specified by you.

At the end of the year you will kindly send us a complete list of the securities held for us, so that we may have a clean sheet to start the new year on and also be able to see that we agree.

We are, dear Sirs,

2681

Yours truly,

P. W. KESSLER.

2682

2683 *Private.*

KESSLER & Co.

Bankers.

54 Wall Street,

NEW YORK, 14 Oct., 1904.

Messrs. KESSLER & Co. Lim.

Manchester.

DEAR SIRs,

Please take note of the following changes in your escrow :

Taken out :

	\$3,000 Underground El. of London notes	\$3,000
2684	\$20,000 Chas. J. Devlin note.....	20,000
	40,000 Hayfield & Octwein Ext. C. & G. W. syndicate certif. calling for	
	59,320 Bonds.....	47,456
	200 shares Stock.....	3,000
	\$78,000 Denver & Southwestern 1st....	28,280

\$101,736

Put in :

	\$8,000 6 months note C. J. Devlin.....	\$8,000
	\$10,000 further participation Certif. C. H. & D. pfd. stock synd.	10,000
	\$25,000 Omaha & Sioux City Ext. Synd. calling for \$37,500 C. Gt. W. 1st	
2685	Mortgage bonds, 80.....	30,000
468	Shares pref. Cripple Creek Central, 75.....	35,000
390	Shares com. Cripple Creek Central, 35.....	13,650
		<hr/>
		\$96,750
	200 Shares I. S. Red. & Ref. pfd. stock at bid price 25.....	5,000

\$101,750

Yours truly,

KESSLER & Co.

KESSLER & Co.
Bankers.

54 Wall Street, 2686
NEW YORK 20 Oct 1904

Messrs. KESSLER & Co. LIM
Manchester

DEAR SIRs,

Please note following changes in your escrow
Taken out.

\$55,000 C. H. & D. stock syndicate receipt		\$55,000	
34,000 St. L. & S. F. 5 y. 4-1/2% notes	92	31,300	
Park of note \$33,000—Florence & Cripple Creek		33,000	2687
Leaving	27,200	5,800	
		<u>\$92,100</u>	

Put in.

Note St. L and S. F. 6% due 1st Decr. 1904		\$43,143.92	
800 Shares pfd U. S. Red. & Ref. Co.	35	28,000.	
Raise price 10 points on 200 sh. already in your escrow...		2,000.	
1,200 shares com U. S. Red. & Ref. Co.	17	20,400.	2688
		<u>\$93,543.82</u>	

Reduction earnings are improving
daily bonds are 73 bid and demand for
stocks at above prices has started.

KESSLER & Co.

2689 *Private*

24th Oct. 4.

Messrs. KESSLER & Co.
New York.

DEAR SIRs,

Your private lines of the 14th inst are to hand and we note the fresh changes made in our escrow which appear to be in order, assuming that the Cripple Creek Central Shares are taken at the market value.

We are, dear Sirs,
Yrs truly,

P. W. KESSLER.

2690

Your typist might be taught to write the name of his firm correctly See encl.

P. W. K.

Private

29th Oct 4.

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We are in due receipt of your favour of 20th Oct advising a further alteration in our escrow. The same is noted. On the whole the security would not appear to have improved this time. We trust the Reduction Co's stocks may reach a satisfactory figure soon to enable you to dispose of same.

2691

Yrs truly,

P. W. KESSLER.

Pr "Tavoli"

2692

KESSLER & Co.

54 Wall Street,

Bankers.

NEW YORK

2 Nov 1904.

Messrs. KESSLER & Co. LIM

Manchester.

DEAR SIRs,

Yesterday the St. Louis and S. Francisco exercised their option and took up the note in your escrow for \$43,143.82 and 6% int. Same is therefore withdrawn from your escrow and we have replaced same by

	Certificates of Indebted-				2693
	ness of the State of Colo-				
	rado			\$12,038.85	
	300 shares Medina Quar-				
	ry at	10	3,000.		
	200 " Columbia Riv-				
	er Packers ...	40	8,000.		
	10,000 " Elkton Mining				
	Co.	70	7,000.		
half stock	100 " Standard Rol-				
	ler Bearing {				
	6% pfd 75.. {				
	70 " do. com. 55 {		7,500.		
	(this latter is				
	worth 100)				2694
	100 " Chicago Ter-				
	minal Trans .	12	1,200.		
	200 " U. S. Leather				
	com	13	2,600.		
				\$41,338.85	

If exchange goes lower we shall gradually draw less.

Yours truly

KESSLER & Co.

2695 *Private*

11th Nov. 4

Messrs. KESSLER & Co.
New York.

DEAR SIRs,

The further alterations in our escrow advised by yours of 2nd inst, is duly noted.

The new securities are a curious looking bunch, and we are not very realizable.

Yours truly,

P. W. KESSLER.

2696

KESSLER & Co., Bankers,
No. 54 Wall Street

Per S. S. "Kaiser Wilhelm Der Grosse"

NEW YORK November 21st 1904

DEAR WILLY:

In reference to the securities put into your escrow on the 2nd of November, they are not at all such a bad lot as you think. I, as a rule, have not written much about the different securities that we put into your escrow as it takes up too much time, and it is absolutely unnecessary; but as you make remarks about them, I must mention that

2697 MEDINA QUARRY stock of course will be slow.

COLUMBIA RIVER PACKERS is expected to pay a dividend in January, and if it does, it ought to be worth par.

ELNTON MINING Co. earned in the month of October \$25,000 net, and in November it is expected to do likewise. It is practically assured that dividends will commence again in December, at the rate of one-half per cent. a month. This will be one-half the amount that they used to pay when we first bought the stock, namely 1% a month. They, however, believe that in February or March they can begin the old 1% a month.

STANDARD ROLLER BEARING Co. preferred stock is 2698 \$50 per share, and not \$100., and has been paying 5% for the last seven years. On the Common stock they have not paid anything yet, but they are earning at the rate of 40% per annum and a large bonus is expected in new stock.

STANDARD TERMINAL TRANSFER, which we put into you at 12, is selling to-day at 16.

UNITED STATES LEATHER, which we put into you at 13, is selling to-day at 15, and as this stock used to sell at \$45., and the leather Company, is now in a much better position than it was then, there is no reason why this stock should not double in value within the next two months. 2699

You will therefore see that your remarks are based on entirely wrong ideas.

ALFRED KESSLER.

Chicago Terminal & Leather were quite active on stock exchange to-day

8100 of the former from 15-1/2 to 16

40,500 of the latter from 14-1/4 to 15 and back to 14-3/4

KESSLER & Co.

Bankers

54 Wall Street,

NEW YORK 4 Jan. 1905 2700

Messrs. KESSLER & Co LIM

Manchester.

DEAR SIRS,

We certify that we have specially set aside and hold for your account on this the 31st day of December, 1904, as security for the drawing credit which you accord us, the following securities:

2428 Sh. United Lighting & Heating	10	\$24,280.—
2352 shs. Daimler Mfg. Co.....	50	117,600.—
56,000 United Brewery 1st 6%..	100 b	56,000.—
50,000 do do notes 6%..		50,000

2701	468 sh. Cripple Creek Central pfd	70	32,760.—
	390 " do com	30	11,700.—
	Note Chas. J. Devlin due Ap		
	13 1905		8,000.—
	1,000 shs. Underground El of		
	London £5.....		
	2,000 shs. Underground El of		
	London £5 Beneficial Int }		25,000.—
	18,000 Notes Underground El		
	of London £5 Beneficial		
	Int at.....	97	17,460.—
	1,000 shs. Medina Quarry Co....		10,000.—
	Midland Terminal Equip		
2702	note		13,000.—
	Colorado Trading & Trans-		
	fer note.....		30,000.—
	Florence & Cripple Creek		
	note		27,200.—
	25,000 Omaha & Sioux City Ex-		
	tension Syndicate \$37,500		
	bonds		30,000.—
	1,000 shs. U. S. Red. & Ref. pfd..	40	40,000.—
	1,000 " do com..	18	18,000.—
	Sundry Certificates of Indebt-		
	edness of State of Colo-		
	rado		12,038.85
2703	70 shs. Standard Roller Bear-		
	ing com.....		
	100 shs. Standard Roller Bear-		
	ing pfd.....		7,500
	10,000 shs. Elkton Cons. Mining		
	Co.		7,000.—
	200 shs Columbia River Packers.	40	8,000.—
			<hr/>
			\$545,538.85
	You hold in addition to this		
	1606 Shares United Light & H..	10	16,060.—
			<hr/>
			\$561,598.85
			<hr/>

Yours Truly,
KESSLER & Co.

Private

17 Jan'y 1905.

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We are in receipt of your private lines of the
4th inst. giving a list of the securities set aside as
cover for your drawing on us.

With our thanks.

We are, dear Sirs,

Yours very truly,

KESSLER & CO. LIMITED

P. W. KESSLER, Director.

2705

"Lucania"

KESSLER & Co.

Bankers.

54 Wall Street,

NEW YORK, 10 Feb 1905.

Messrs. KESSLER & Co. LIM
Manchester.

DEAR SIRs,

Having sold all the London Underground notes,
we have withdrawn \$18,000 at 97—\$17,460.—and
have placed in escrow 150 shares First National
Bank of Topeka at 120—\$18,000.—This Bank
pays 7% dividends and is considered very good 2706
property.

Yours truly,

KESSLER & Co.

Private.

21 FEBY 5.

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We acknowledge receipt of your favour of the
10th inst. advising exchange in our escrow of

- 2707 \$18,000 London Underground notes for 150 Shares
First National Bank of Topeka, of which we take
due not.

We are, dear Sirs,

Yours very truly,

KESSLER & Co., LIMITED,

P. W. KESSLER, Director.

KESSLER & Co.,

Bankers.

54 Wall Street,

NEW YORK, 6 March, 1905.

- 2708 Messrs. KESSLER & Co. Lim.
Manchester.

DEAR SIRs,

In reply to your remark about the United
Breweries notes of \$50,000 being long winded; they
are indeed so as they are due

\$15,000	Sept. 1911	\$10,000	Sept. 17 1912
\$5,000	Sept. 1913	\$20,000	Sept. 1914

They are in the nature of being a debenture bond
or 2nd Mortgage bond and was the best settlement
we could obtain at time of reorganization.

- Please take note that the \$13,000—Midland Firm
2709 Equip note and \$12,038.85 State of Colorado Cer-
tif. of indebtedness have been paid off, the Re-
duction stocks are active at 25 for the common and
46 for the preferred this makes a difference in es-
crow prices of \$6,000—on 1000 pfd. and \$7,000 on
1000 common, we have to-day added 500 Shares
more common to your escrow at 25—\$12,500—in
substitution.

Yours truly,

KESSLER & Co.

2710

Private.

21st MARCH 5.

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We duly received your favor of the 6th inst. advising withdrawal of notes

\$13,000 Mid. Firm Equip.

\$12,038.85 Col. State Cert.

from our escrow.

We note the manner in which you make this good and are glad to see the appreciation in the value of your Red. & Ref. Shares. We hope you²⁷¹¹ may be able to realize profitably on some of them ere long.

Yours very truly,

KESSLER & Co., LIMITED,
P. W. KESSLER, Director.

2712

2713 pr "New York"

KESSLER & Co

Bankers

54 Wall Street,

NEW YORK, 13th April, 1905.

Messrs. KESSLER & Co. Lim.

Manchester.

DEAR SIRs,

The following having been paid off, we have taken same out of your escrow, viz:—

	Florence & C. C. note.....	\$27,200.
	Col. Trad. & Transf. Note on a/c \$30,000.	4,500.
2714	Devlin note	8,000.

 \$39,700.

We have not added to escrow owing to enhanced value of U. S. Reduction & Refining stocks.

36	against 25 for common.....	\$16,500.
----	----------------------------	-----------

67	against 46 for pfd.....	21,000.
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 \$37,500.

Besides we are not drawing for original amount of escrow.

Yours truly,

KESSLER & Co.

2715

Private.

25th APRIL 5.

Messrs. KESSLER & Co.

New York.

DEAR SIRs,

We are in receipt of your favour of 13th inst advising withdrawals from our escrow, without replacement owing to enhanced value of the U. S. Red & Ref. stocks.

We are glad to note this appreciation and also the reduction in the amount of your drawings.

You know our desire in regard to this last and 2716
trust that in the course of this year you may be
able to give good effect to it.

Yours very truly,

KESSLER & Co., LIMITED,
P. W. KESSLER, Director.

KESSLER & Co.

Bankers

54 Wall Street,

NEW YORK, 15 May 1905.

Messrs. KESSLER & Co.

Manchester.

2717

DEAR SIRs,

We have withdrawn from your escrow

200 U. S. Reduction pfd. at 67.....	\$13,400.
-------------------------------------	-----------

500 U. S. Reduction com. at 36.....	18,000.
-------------------------------------	---------

\$31,400

and have placed in same another 150

shs. of 1st Nat. Bank of Topeka at

120	\$18,000.
-----------	-----------

Prices of Reduction Stock to-day are 31 for
common and 63 for pref.

We refrained from putting anything else in the
escrow, for in spite of these prices you have 2718
\$537,000 collateral whereas our drawings are only
\$480,000.

Yours truly,

KESSLER & Co.

2719 *Private.*

25th MAY 5

MESSRS. KESSLER & Co.
New York.

DEAR SIRs,

We note from your letter of 15th May the further change in our escrow. The same seems in order.

We should be quite glad to see your drawings very considerable reduced, with a corresponding reduction in the escrow.

Yours very truly,

KESSLER & Co. LIMITED.
P. W. KESSLER, Director

2720

7 Norfolk Street,
MANCHESTER, 1st June, 1905.

Written at 260 West Broadway, New York.
MESSRS. KESSLER & Co. LTD.,
33 Dale Street,
Manchester, Eng.

DEAR SIRs:

2721 I called at your New York house this morning and had produced for my inspection the following securities which are all deposited in the vault in escrow in your name and are likewise so described in their books. The only variation from the list you supplied to me appears to be the substitution of 150 shares of the First National Bank of Topeka for 200 Preferred and 500 Common Stock of the U. S. Reduction & Refining Co. The Common Stock (not bonds as you say on your list) of the Elkton Mining Co. is held by Messrs. Shove, Aldrich & Co., of Colorado for a/c Kessler & Co., and I had produced to me their last letter dated 29th May, 1905, enclosing the monthly dividend and which stated that \$5,000. of the stock was for

a/c Kessler & Co. and \$5,000. was for a/c A. Kess- 2722
ler.

I have not attempted to verify the value of the
stocks.

Yours faithfully,

FRANK YOUATT.

1st JUNE, 1905.

2428 Shares United Lighting & Heating Co. Com-
mon Stock.

2352 Shares Daimler Vehicle Co.

\$56,000. United Breweries of Chicago 6% Mort-
gage Bonds.

\$50,000. United Breweries Long dated Notes. 2723

468 Shares of Colorado & Cripple Creek Preferred
Stock.

390 Shares of Colorado & Cripple Creek Common
Stock.

1000 Shares London Underground £10 shares £5
paid.

2000 Shares London Underground Beneficial In-
terest shares £1 ea fully paid.

1000 Shares Medina Quarry Common Stock.

\$25,500. Col. Trading & Transfer Co. Note \$150,-
000 less already repaid \$24,500.

\$25,000. Omaha & Sioux City Syndicate shares
(This is being squared up to-day by payment of 2724
85% in cash and certain stocks and bonds of the
Chicago & Northwestern, amount not definitely
known).

800 shares U. S. Reduction & Refining Co. Pre-
ferred Stock.

100 shares U. S. Reduction & Refining Co. Com-
mon Stock.

70 shares Standard Roller Co. Common Stock.

100 shares Standard Roller Co. Preferred Stock.

\$10,000. Elkton Mining Co. Common Stock.

200 Shares Columbia River Co. Common Stock.

300 Shares 1st National Bank of Topeka Common
Stock.

F. Y.

2725 KESSLER & Co.

Bankers

54 Wall Street,

NEW YORK 2 June 1905

Messrs. KESSLER & Co. Lim

Manchester.

DEAR SIRs,

The Chicago Gt. Western Syndicate having paid yesterday 85% we have withdrawn from your escrow \$25,000

Omaha Sioux City Ext. bonds value.....	30,000
2726 and 300 shares pfd. U. S. Red & Ref. 63..	18,900

\$48,900

and have placed in same Syndicate Certificate calling for \$164,392.50 Chicago St. West B. stock worth at to-day's price 31—\$50,961.67. The Syndicate managers state that these will not be sold under 40, and that probably in 3 months.

Yours truly,

KESSLER & Co.

Private.

27th JUNE 5.

2727 Messrs. KESSLER & Co.,

New York.

DEAR SIRs,

We safely received your favour of the 2nd inst and note the further withdrawal from and addition to our escrow therein advised.

As you realize your old holdings, we shall of course be pleased to see a contraction in the amount of your acceptances.

Yours very truly,

KESSLER & Co. LIMITED.

P. W. KESSLER, Director.

KESSLER & Co.
Bankers

2728

54 WALL STREET,
New York 14th July, 1905

Messrs. KESSLER & Co., Lim
Manchester.

DEAR SIRs,

Having made a few changes in your escrow since 1st July we beg to enclose new list of the escrow as it stands to-day with present quotations amounting to \$536,431.67. Some of the securities are paying dividends.

U. Breweries bonds.....	6%	
do. Notes.....	6%	2729

Cripple C. Cent Pfd 4% (Just declared 3% for 9 ms)

Col. Trading Note..... 6%

U. S. Red & Ref. pfd..... (6%) commences
Oct 1905

Standard Roller pfd..... 6%

Elkton 6% (1½% monthly)

Central Nat. Bk..... 7%

Pikes Peak Hydro..... 5%

Yours truly,

KESSLER & Co.

2730

2731 Escrow KESSLER & Co. Lim 14 JULY 1905.

	2428 Sh. United L. & Heat (10) .. 10	\$24,280.
	1606 " do. in Manchester, 10	16,060.
	2352 " Daimler Mfg. Co. 50	117,600.
	\$56,000 United Breweries Bonds .. 100	56,000.
	"50,000 do. Notes .. 100	50,000.
	468 Sh. Cripple Creek Central pfd, 70	32,760.
	390 " do. com., 33	12,870.
	1000 " London Underground £5 pd. . }	25,000.
	2000 " do Beneficial Ctf }	
	1000 " Medina Quarry 5	5,000.
	\$25,500 Col. Trading & Transf. note ..	25,500.
	500 sh. U. S. Reduction & Ref. pfd 67	33,500.
2732	1000 " do do com 32	32,000.
	70 " Standard Roller Bearing Com }	7,500.
	100 " do do pfd }	
	10000 " Elkton Mining 50	5,000.
	200 " Columbia River Packers .. 40	8,000.
	\$164,392.50 Hayfield & Octwein Syn.	
	Certif. calling for C. G. W. B's 31	50,961.67
	200 sh. Central Nat. Bk. Topeka 100	20,000.
	\$18,000 Pikes Peak Hydro El. Co. 1st	
	Mort 5% Jan. & July 1923 80	14,400.

\$536,431.67

KESSLER & Co.

2733

Private

25 JULY 5.

Messrs. KESSLER & Co.,

New York.

DEAR SIRs,

Your favour of 14th inst is to hand with a revised list of securities in our escrow, of which we take due note.

We are, dear Sirs,

Yours very truly,
P. W. KESSLER.

KESSLER & Co.

2734

Bankers.

54 Wall Street,

NEW YORK 23 OCT 1905

Messrs. KESSLER & Co. Lim

Manchester.

DEAR SIRs,

Please take note that the Colorado Trading & Transfer note for \$25,500.— has been paid off with 6% interest to date. In place of above we have put in your escrow \$28,000 Pittsburg Westmoreland & Somerset 1st Mortgage 5% bonds at 90— \$25,200.—

Some changes of prices in your escrow list are: 2735

Cripple Creek Central com.....	40	Bid
C. Gt. Western B prf.....	36	"
U. S. Reduction prf.....	71	"
Elkton Mine	56	"

Yours truly,

KESSLER & Co.

2736

2737 *Private*

2nd Nov. 5.

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We note from your favour of the 23rd ulto that the Colorado T. & T. Co's note has been taken up and been replaced in our escrow by \$28,000. Pittsburg, Westmoreland and Somerset R. R. Co's 5% bonds. This seems to be a 1 horse sort of a line, dependent for its credit upon a lim. lib. Co. which we hope is sound.

2738 We note the improvement in some of the prices of the securities deposited. What are U. S. Red. & Ref. common worth now?

Yours very truly,

P. W. KESSLER.

Private

KESSLER & Co.
Bankers

54 Wall Street,
NEW YORK 17 Nov. 1905.

2739 Messrs. KESSLER & Co. Lim
Manchester.

DEAR SIRs,

Yours of 2nd Nov. to hand.

Estimated earnings of Pittsburg Westmoreland and Somerset are not including revenue from handling coal, as development will probably be gradual. This traffic will more than compensate for the future decline of the lumber industry and it is likely the revenue from handling coal will in time be the main source of income.

Passenger business based on 2 trains each way per day and extra train dur- ing summer say 50,000 train miles at 60 cents.....	\$30,000.—	
Forest products, logs for mill ties poles, pit props etc 5000 cars at \$5.—.	25,000.—	
Finished lumber 1300 cars at \$6....	7,800.—	
Char-coal 500 cars at \$8.....	4,000.—	
Gin merchandise, cattle, hay and farm products, agricultural imple- ments etc. 1900 cars at \$12.....	22,800.—	
Quarry products, limestone, blue- stone, sandstone, fireclay, etc. 1900 cars at \$6.—.....	11,400.—	2741
Other sources mail, express.....	5,000.—	
Total earnings.....	\$106,000.—	
Operating expenses 55%.....	58,300.—	
	47,700.—	
Fixed charges on \$500,000.....	25,000.—	
Surplus for stock.....	\$ 22,700.—	

These earnings are said to be a very low estimate but as the road will only be finished in December, 2742 we must wait and see. I presume the B. & O. will buy out the Co when finished.

U. S. Red. Com 29

" " " pfd 68-3/4 bid 69-1/2 asked.

KESSLER & CO.

2743 KESSLER & Co.
Bankers

54 Wall Street,

NEW YORK 5 Jan 1906

Messrs. KESSLER & Co. Lim
Manchester.

DEAR SIRs,

We certify that we have specially set aside and hold for your account on the 31st day of December 1905, as security for the drawing credit which you accord us, the following securities:

	2428 Shs. United Light & Heating..	10	\$24,280.—
	2352 " Daimler Mfg. Co.....	50	116,600.—
2744	56,000 United Breweries 1st 6's.....		56,000.—
	50,000 " 6% notes.....		50,000.—
	468 Shs. Cripple Creek Cent pfd	61	28,548.—
	390 " do " Com	41	15,990.—
	1,000 " Underground El of London..	}	25,000.—
	2,000 " " Beneficial Certf....		
	1,000 " Medina Quarry Co.....	5	5,000.—
	500 " United S. Red. & Ref. pfd	70	35,000.—
	1,000 " " " " com 30-1/2		30,500.—
	70 " Standard Roller Bearing....	}	7,500.—
	100 " do pfd.....		
	10,000 " Elkton Cons Mining.....	50	5,000.—
	200 " Columbia River Pkrs.....	40	8,000.—
2745	Hayfield & Octwein Syn calling for..		1,429.—
	\$164,392.50 Chicago Gt. West pfd B	35	57,537.37
	200 Shs. Cent. Nat Bk Topeka....	80	16,000.—
	\$ 18,000. Pykes Peak Hydro El 1st 5%		
		80	14,400.—
	\$ 28,000. Pittsburg West. & Somerset		
	1st 5.....	95	26,600.—
<hr/>			
			\$522,955.37

Lying with you

1,605 shs United Light & Heating 10 & 16,060.—

\$539,015.37

Yours truly,

KESSLER & Co.

Private

16th JANUARY 6

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We are in receipt of your favour of the 5th inst.
with the list of the securities held in escrow for us
against our drawing credit, of which we take note
with thanks.

We are, dear Sirs,

Yours very truly,

P. W. KESSLER.

2747

KESSLER & Co.
Bankers.

54 Wall Street,
NEW YORK, 24 Aug. 1906.

List of Kessler & Co., Lim., Escrow.

2428 Shs. United Lighting & Heat	10	\$24,280	
1606 " " " in Manchester. . . .	10	16,060	
2352 " Daimler Mfg. Co.	50	117,600	
56,000 United Breweries 1st M G's. . . .	100	56,000	
50,000 do notes	100	50,000	2748
1000 Shs. Underground El London L6 1/4 paid			
2000 Shs. Underground Beneficial Cert. .		31,460	
70 " Standard Roller Bearing			
100 " " " pfd.		7,500	
10,000 Sh. Elkton Mining Co.	50	5,000	
200 " Columbia River Packers	40	8,000	
468 " Cripple Creek Central pf. . . .	70	32,760	
390 " do com.	90	35,100	
18,000 Pikes Peak Hydro El 1st 5's . . .	80	14,400	

2749	500 Shs. U. S. Red. & Refining Co. pfd.	76	38,000
	1,000 " do com.	36	36,000
	23,000 Pittsburg West. & Somerset 1st		
	5's	95	21,850
	45,000 Notes of Orleans County Quarry		
	secured by \$60,000 1st M 5% of same		
	Company		
			<hr/>
			\$539,010

KESSLER & Co.

2750

Private

4th Sept. 6.

MESSRS. KESSLER & Co.,
New York.

DEAR SIRs,

We have received through Mr. Alfred Kessler a revised list, dated 24th August, of the securities now set aside against your drawing credit on us.

We duly take note of these particulars and are dear Sirs,

Yours very truly,

2751

P. W. KESSLER.

KESSLER & Co.

2752

Bankers.

54 Wall Street

New York 14 Sept. 1906.

Messrs. KESSLER & Co., LIM.

Manchester.

DEAR SIRs,

Since our list of 24 Aug. of your escrow we have taken out

468 Shs. Cripple Creek cent. pfd70	\$32,760
390 " do do do90	35,100

\$67,860 2753

and have substituted

20,000 Victor Fuel 1st 5's90	\$18,000.
----------------------------	---------	-----------

25,000 Indiana Columbus & East

Traction 1st 5's90	22,500.
------------------	---------	---------

22,000 Pitts. West & Somerset 1st

5's95	20,900.
-----	---------	---------

\$61,400.

In addition we have paid another in-

stalment on 1,000 London Under-

ground of £1:5 6,059.38

now £7:10:0 paid \$67,459.38 2754

Please take note of this change.

Yours truly,

KESSLER & Co.

2755 *Private*

25th Sept. 6.

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We have your favour of the 14th instant with particulars of further changes in our escrow, of which we take note.

The Victoria Fuel and Inda. Columbus & East Traction are new to us. Of the Pittsburgh West. & S. we have a good many now.

Yours very truly,

P. W. KESSLER.

2756

Private

2d October, 6.

Messrs. KESSLER & Co.
New York.

DEAR SIRs,

In view of the approach of the end of the year and of the termination at that time of your present partnership contract, we think it right that we should notify you that in the future, we shall not be able to accord you the same large drawing facilities that we have been pleased to place at your disposal in the past. Circumstances have much changed and we shall, after this year, have to ask you to limit your drawings to an amount more in accordance with general usage.

2757

In view of possible negotiations that you may have in hand we think it proper that you should have this notification.

We are, dear sirs,

Yours very truly,

P. W. KESSLER.

Private

2758

KESSLER & Co., Bankers.
No. 54 Wall Street.

Per S. S. "La Provence"

New York, October 3rd, 1906.

Messrs. KESSLER & Co., Ltd.,
33 Dale Street,
Manchester, Eng.

DEAR SIR:—

In reply to your private lines of the 25th of September, the Victor Fuel Company Bonds are an issue taken by Clark, Dodge & Co., of \$2,000,000. 5% First Mortgage Bonds, due 1953. Agreement was dated 1st of March, 1906, and expires March, 1907. We took a participation in this of \$100,000, bonds at 90 and interest. So far, they have sold a little over \$1,600,000, leaving about \$400,000 for sale, which pro rata would exactly represent the 20 bonds we have. The Company is doing very well and earning about six times the interest on these bonds. 2759

Indiana, Columbus & Eastern Traction Co. This is an issue of \$4,900,000. General Refunding 5% Bonds due 1926, and is the syndicate formed by Drexel & Co. We took a participation of \$100,000, at 88½ and interest, with an agreement with the Bankers to give up half, viz., \$50,000 of bonds, to them on an option due first of January, 1907, at the same price. This syndicate lasts until July 1st, 1907. We have so far had to take up 25 of the bonds, and are writing to-day to Messrs. Drexel & Co., Philadelphia, to hear how the sale of the bonds has been getting on. The company is a trolley line similar to the Indianapolis & Northwestern, which bonds we had some time ago in the syndicate with Rollins, on which we made 5% interest on the bonds plus 3% commission. 2760

We take note of what you say in regard to Pittsburgh, Westmoreland & Somerset. They paid their

2761 coupons on the 1st of October and the Road is doing well.

Yours very truly,

KESSLER & Co.

KESSLER & Co.

Bankers.

54 Wall Street,

New York, 19 Nov. 1906.

Messrs. KESSLER & Co., Lim.

Manchester.

DEAR SIRs,

Having sold \$13,000 Indiana, Columbus & Eastern Traction 1st Mortgage bonds, value \$11,700—
2762 We have withdrawn same from your escrow and have put in their place 475 shares Green Consolidated Copper at 26—\$12,350. The par value is \$10 and the stock pays 24% p. s. and is very active on the curb market.

Yours truly,

KESSLER & Co.

Private

1st Dec. 6.

Messrs. KESSLER & Co.,

New York.

2763 DEAR SIRs,

Your favour of the 19th ulto. advising a change in our escrow, has been safely received and the change has been duly noted by us.

Yours very truly,

P. W. KESSLER.

MEMORANDUM.

2764

From KESSLER & Co.,

Bankers,

54 Wall Street,

New York Dec. 31, 1906

To KESSLER & Co., LIM

Manchester.

2428 Sh. United Lighting & Heat		
at	10	\$24,280.—
1606 Sh. United Lighting & Heat		
in Manchester	10	16,060.—
2352 Sh. Daimler Mfga. Co.	50	117,600.—
56,000 United Breweries 1st M.		
6½	100	56,000.—
50,000 do. Notes ..	100	50,000.—
1000 sh. Underground El. Ldn. }		2765
£7-1½ paid		
2000 sh. Underground Benefi- }		3,519.38
cial Cert. }		
70 sh. Standard Roller Bear- }		7,500.—
ing		
100 sh. Standard Roller pfd. }		
100,000 sh. Elkton Mining Co.	68	6,800.—
\$18,00 Pike's Peak Hydro El 1st		
5½	80	14,400.—
500 sh. U. S. Red & Ref. Co. pfd. .	70	35,000.—
1000 " do do com. .	29	29,000.—
\$45,000 Pittsbg. West. & Somerset		
1st 5½	95	42,750.—
45,000 Notes of Orleans County }		2766
Quarry secured by \$60,000 1st }		45,000.—
M 5% of same Company }		
12,000 Ind. Col. & East. Tract.		
1st	90	10,800.—
288 sh. Muskogee Gas & Elect.		
Com	10	2,880.—
288 sh. Muskogee Gas & Elect.		
Pfd	30	8,640.—
\$10,000 Muskogee Gas & Elect.		
Refdg	85	34,000.—

 \$538,229.38

KESSLER & Co.

2767 *Private*

1st March 7

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We are in receipt of your favor of the 18th ulto giving particulars of a change in our escrow of which due note is taken.

Yours very truly,

P. W. KESSLER.

 Private

9th Jany. 7

2768 Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We are in receipt of the new list of securities which you hold in escrow for us against our drawing credit and the same appears to be in order.

Yours very truly,

P. W. KESSLER.

We anticipate that you will give effect to our desire to have the amount of draft on us reduced.

2769

per "Majestic"

2770

54 Wall Street,
New York 18 Feb 1907

KESSLER & Co.
Bankers.

Messrs. KESSLER & Co., LTD.,
Manchester.

DEAR SIRS.

We beg to notify you that we have	
withdrawn	\$18,000 —
Pikes Peak Hydro Electric 1st 5%	
bonds	\$14,400
and have placed in your escrow	
\$3,000—Muskogee Gas & El 1st and	2771
Ref 5% bonds at 85	2,550
and a final payment on 1000 Shares	
Underground El of London of £2.10	
per share	12,143.75
	<hr/>
	14,693.75

We are informed that the Muskogee Plant is earning more than twice the interest on the bonds, which insures the 6% div. on the preferred stock of which there is only \$280,000. outstanding and which is the total issue.

Yours truly,

2772

KESSLER & Co.

2773 K. W. II

KESSLER & Co.

Bankers.

54 Wall Street,

New York 8th July 1907.

Messrs. KESSLER & Co. LIM

Manchester.

DEAR SIRs,

We have withdrawn from your escrow

1,000 Muskogee Gas & El \$ 850 —

60,000 Orleans Quarry with note for

\$40,000 45,000 —

\$45,850 —

and placed in same

2774 \$40,000 Synd Participation Western

Pacific 1st Mortgage 5% bonds

paid in } 7,234.38

548 Ch. Gt. W. Pfd. B at 16 8,768 —

and Title deed to 1018, 1020, 1022

Bedford Ave. Property, Brooklyn

so called Mackay Mortgage—1018

and 1022 are free and clear; there

is a mortgage on 1020 for \$9,000

out standing. We are bid \$42,000

and are asking \$47,500 } 31,000 —

\$47,002.38

2775

KESSLER & Co.

Private

16 July 7

Messrs. KESSLER & Co.,

New York.

DEAR SIRs,

We note from your favour of the 8th instant the alteration made in our escrow. We do not know that Real Estate is just the thing for an escrow of this sort, but we hope you may soon get your price for it and so iliminate it from your assets.

Yours very truly,

P. W. KESSLER.

KESSLER & Co.,
Bankers.

54 Wall Street,
New York 27 Aug 1907.

2776

Messrs. KESSLER & Co. LIM
Manchester.

DEAR SIRs,

A few days ago we sold at 90½ and Int \$20,000 Muskogee Gas & El. Bonds and withdrew them from your escrow replacing them by \$20,000 Orleans County Quarry bonds 1st 6% 's at 90.

We cabled you to-day we had drawn £20,000 60 d/s on your goodselves and have placed in a separate escrow against this the following:

\$25,000 Orleans Co. Quarry 1st 6s at 90..	\$22,500	2777
Note \$10,000 Orleans Co. Quarry secured by bonds at 75 Nov. 7.....	10,000	
Note \$10,000 Orleans Co. Quarry secured by bonds.....	10,000	
Note \$4,775 Orleans Co. Quarry secured by bonds Nov. 18.....	4,775	
Note \$8,000 R. B. Maclea Co. Due Dec. 5.	8,000	
Note \$7,000 " " "	7,000	
Note \$5,000 " " "	5,000	
Note \$16,000 Milne Turnbull & Co. Nov. 11	16,000	
Note \$17,000 " " Dec. 27	17,000	
Note \$7,000 " " "	7,000	
	<hr/>	
	\$107,275	2778

Yours truly,

KESSLER & Co.

Private

4th Sept. 7

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We note from your favour of the 27th ulto. the change you have made in our escrow.

We also take note of the securities which you

2779 have lodged in a new separate escrow against your special drawing of £20,000 about which you cabled us and which you advise in your ordinary correspondence received to-day.

We anticipate that this special drawing will not be renewed and that your drafts on us generally will presently come to a more moderate level.

Yours very truly,

P. W. KESSLER.

KESSLER & Co.

Bankers

54 Wall Street

New York 23 Sept 1907

Messrs. KESSLER & Co., LIM.,

2780

Manchester.

DEAR SIRs,

In regard to your escrow for the recently drawn £20,000 We beg to say we have withdrawn the two Orleans County Quarry, 2 notes for each \$10,000 and bonds as collateral \$20,000 and have replaced same by

200 Shares Com Cripple Creek Cent. at

67 13,400

200 Shares pfd Cripple Creek Cent. at 67. 13,400

\$26,800

of which please take note.

2781

Yours truly,

KESSLER & Co.

Private

2nd Oct 7

Messrs. KESSLER & Co.,

New York.

DEAR SIRs,

Your favour of the 23rd instant is to hand and we take note of the change made in our supplementary escrow.

Yours very truly,

P. W. KESSLER.

KESSLER & Co.
Bankers.

54 Wall Street, 2782
NEW YORK 2nd Oct 1907.

MESSRS. KESSLER & Co., Lim.,
Manchester.

DEAR SIRs,

We have again withdrawn from your £20,000
escrow \$8,000 Note of the R. B. Maclea Co.

7,000 do do

\$15,000 and have replaced same with

166 shares Cripple Creek pfd at 67..\$11,122

100 do com do.. 6,700

\$17,822 2783

Please take note of this change.

Yours truly,

KESSLER & Co.

Private

11th Oct 7

MESSRS. KESSLER & Co.,
New York.

DEAR SIRs,

We are in receipt of your favour of the 2nd inst.
advising withdrawal of \$15,000 in notes of R. B.
Maclea & Co. from our escrow for £20,000 and re-
placement by 166 Pfd Shares of the C. C. C. Rye. 2784
and 100 Com. do. do. of which we take note.

How does our old escrow stand in view of the
fire at the Daimler Works? Can the shares be
said to be worth anything like the value set against
them?

Has anything been done with the Mackay Mort-
gage?

As anything in our escrow is realized, we should
much like to see a corresponding reduction in your
drawings. We hope this may be attainable.

Yours very truly,

P. W. KESSLER,

2785 KESSLER & Co.

54 Wall Street
NEW YORK 25th Oct. 1907.MESSRS. KESSLER & Co., Lim.,
Manchester.

DEAR SIRS,

We handed Mr. Henry Kessler to-day, your two escrows, as per list enclosed, please cancel old list. You will notice we have put Daimler pfd in your escrow in place of common. We think eventually we ought to get something for the common stock too.

2786 Mr. Henry Kessler took a separate vault box for these escrows and Mr. Albert Kessler, Otto G. Kessler and North McLean have access to same. The box is in name of K & C Lim Manchester No. 2097.

Yours truly,

KESSLER & Co.

Escrow Kessler & Co., Ltd. Manchester.

2428 sh. United Lighting & Heat	10	\$24,280.—
1606 " " in Manchester	10	16,060.—
1341 " Daimler Mfg. Co., pfd..	100	134,100.—
\$56,000 United Breweries M. 6's	80	44,800.—
2787 \$50,000 " Notes		50,000.—
1000 sh. Underground El: Ldn	}	
full paid.....		
2000 sh. Underground El: Bene-	}	49,663.13
ficial Cert.		
70 sh. Standard Roller Bearing		
\$50 share	60	4,200.—
100 " " " Pfd.....	50	5,000.—
10,000 sh. Elkton Mining Co.....	50	5,000.—
500 sh. U. S. Red. and Ref. Co. pfd.	25	12,5000.—
1,000 sh. " " com	10	10,000.—
\$45,000 Pittsburg, Westmoreland &		
Som. 1st 5's	95	42,750.—

12,000 Ind. Col. & East Tract 1st	90	10,800.—	2788
288 sh. Muskogee Gas & Elect.			
Com	20	5,760.—	
288 sh. Muskogee Gas & Elect.			
Pfd	60	17,280.—	
\$22,000 Muskogee Gas & Elect.			
Refdg	87	19,140.—	
Bedford Avenue property		31,000.—	
Western Pacific Syn. rect.....		7,234.38	
548 sh. Chicago, Git. Westn Pfd B	10	5,480.—	
\$20,000 Orleans County Quarry			
Co. 1st	90	18,000.—	
		<hr/>	
		\$513,047.41	2789

Kessler & Co., Ltd., Special Escrow £20,000—			
60 d/s			
\$25,000 Orleans County Quarry..		\$22,500.—	
Note, Milne, Turnbull & Co. due			
Nov. 11		16,000.—	
Note, Milne, Turnbull & Co. due			
Dec. 27		7,000.—	
Note, Milne, Turnbull & Co. due			
Dec. 27		17,000.—	
Note, R. B. Maclea Co. due Dec. 5		5,000.—	
300 sh. Cripple Creek Com.	67	20,100.—	2790
466 sh. Cripple Creek Pfd	"	31,222.—	
		<hr/>	
		\$118,822.—	

2791 **Kessler & Co., Ltd., Ex. B, Dec. 2/07.**
J. O. N.

Cable Address
 TYZEPHYRA
 New York.

P. O. Box 1105

KESSLER & CO., BANKERS.

No. 54 Wall Street.

Per S. S. "*Oceanic*."

NEW YORK, June 30th, 1903.

Messrs. KESSLER & Co., Ltd,
 Manchester.

2792 DEAR SIR:—

In accordance with instructions from Mr. Alfred Kessler, we have to-day placed in a separate package in our safe deposit vaults the following securities, package marked, "Escrow for account of Kessler & Co., Limited, Manchester:"

1484 shares Oklahoma Gas & Electric Co., at	25	\$37,100.
2428 shares United Lighting & Heating Co., at	12	29,136.
2352 shares Daimler Manufacturing Company, at	50	117,600.
2793 \$373,000 United Breweries Co. first 6s, at	65	242,245.
		<hr/>
		\$406,081.

This escrow is intended as a protection against our long drawings against your good selves.

Kindly confirm if in order, and oblige

Yours very truly,

KESSLER & CO.

Kessler & Co., Ltd., Ex. J, Dec. 11/07, 27
J. O. N.

KESSLER & Co. p. *Kais. Wilh. II.*
 Bankers.

54 Wall Street.

No. 210 NEW YORK, Oct. 28th, 1907.

Cable Address:

TYZEPHYRA, New York.

MESSRS. KESSLER & Co. Ltd.
 Manchester.

DEAR SIRs:—

We confirm our last respects of No. 209 and beg to acknowledge receipt of your favor of the 15th inst., contents of which are duly noted.

We beg to advise having received Ch. \$627.14 from J. W. Goddard & Sons for which please debit us at 483 with £129-16-10 and we have paid by cash \$350 to Mr. E. W. Seidler, for which please credit at 481-1/2 with £72-13-9 both for account of Bradford.

We have further paid \$25 to the North America & Safe Deposit Co for which please credit us at 480 £5-4-2.

We remain, dear Sirs,

Yours truly

Please draw on Nov 6th £20,000 Ch on Messrs Glyn & Co London & oblige dear sir

Yours truly

ALB. KESSLER.

Adved B'ford
 5/11/07
 W 133

W
 133

2797 **Kessler & Co., Ltd., Ex. P, Dec. 11/07,**
J. O. N.

KNOW ALL MEN BY THESE PRESENTS that, WHEREAS ALFRED KESSLER, RUDOLPH F. FLINSCH and WILLIAM K. GILLETT individually and as co-partners, composing the firm of KESSLER & COMPANY, Bankers and Brokers of No. 54 Wall Street, Manhattan, New York City, are justly and truly indebted to Kessler & Company Limited, England, in the sum of Four hundred thousand Dollars (\$400,000.00) and upwards, and

2798 WHEREAS the said firm of Kessler & Company of No. 54 Wall Street, Manhattan, New York City, have deposited with Kessler & Company Limited of Manchester, England, certain securities as collateral to the said indebtedness, which said securities are held in the name of Kessler & Company Limited, in the safe deposit vaults in the North American Safe Deposit Company in the City of New York, and are now in the possession of and under the sole control of Kessler & Company, Limited. Now, in order that the securities comprising such collateral may be from time to time exchanged or replaced without in any way impairing the total value of the securities so deposited as collateral to the said indebtedness, the said Kessler & Company, Limited of Manchester, England, does hereby
2799 make, constitute and appoint as its agents for it specified the following gentlemen: ALFRED KESSLER and OTTO G. NESTLE and the said Kessler & Company, Limited, of Manchester, England, does hereby authorize and empower the said ALBERT KESSLER and OTTO G. NESTLE and each of them, from time to time as may be requested by Kessler & Company of Manchester, England, to allow any person, corporation or co-partnership to replace the securities so pledged as collateral to the indebtedness of Kessler & Company of New York to Kessler

& Company Limited of Manchester, England, by 2800
other securities, providing that the total value of
the said collaterals is not thereby lessened, except
in proportion as the indebtedness is from time to
time reduced, or as the same may vary from time
to time.

IN WITNESS WHEREOF the said Kessler & Com-
pany Limited of Manchester, England, has caused
these presents to be signed in its corporate name
by Henry Kessler, Chairman of the Board of Di-
rectors and of the Company, this 30th day of
October, 1907.

KESSLER & COMPANY.

Limited.

2801

[SEAL]

T. H. KESSLER,

Director.

Sworn and subscribed to before me }
this 30th day of Oct., 1907. }

PHILIP F. W. AHRENS,

Notary Public.

We, the undersigned, ALBERT KESSLER and OTTO
G. NESTLE, do hereby accept the trust and agency
conferred upon us by Kessler & Company Limited
of Manchester, England, and agree to act faithfully
as agents of the said Kessler & Company Limited,
in the premises.

2802

IN WITNESS WHEREOF we have hereunto subscrib-
ed our names this 30th day of October, 1907.

ALBERT KESSLER.

OTTO G. NESTLE.

STATE OF NEW YORK, {
County of New York, { ss.:

On this 30th day of October in the year 1907
before me personally came ALBERT KESSLER and
OTTO G. NESTLE, to me known to be the individ-
uals described in and who executed the within in-

2803 strument, and severally acknowledged that they executed the same for the purposes therein mentioned.

PHILIP F. W. AHRENS,
Notary Public,
New York County.

**Kessler & Co., Ltd., Ex. T, Dec. 11 07,
J. O. N.**

2804 KNOW ALL MEN BY THESE PRESENTS that, Whereas, Alfred Kessler, Rudolph E. F. Flinsch and William R. Gillett, individually and as copartners, composing the firm of KESSLER & COMPANY, Bankers and Brokers, of No. 54 Wall Street, Manhattan, New York City, are justly and truly indebted to Kessler & Company, Limited, of Manchester, England, in the sum of Five hundred thousand Dollars (\$500,000.00) and upwards, and

2805 WHEREAS, the said firm of Kessler & Company, of No. 54 Wall Street, Manhattan, New York City, have deposited with Kessler & Company, Limited, of Manchester, England, certain securities as collateral to the said indebtedness, which said securities are held in the name of Kessler & Company, Limited, in the safe deposit vaults in the North American Safe Deposit Company, in the City of New York. Now in order that the securities comprising such collateral may be from time to time exchanged or replaced by the said Kessler & Company, of New York, without in any way impairing the total value of the securities so deposited as collateral to the said indebtedness, the said Kessler & Company, Limited, of Manchester, England, does hereby make, constitute and appoint as its agents for it and in its behalf, to act for the purposes hereinafter specified, the following gentlemen: Albert Kessler and Otto G. Nestle, and the said Kessler & Company, Limited, of Manchester, Eng-

land, does hereby authorize and empower the said 2806
 Albert Kessler and Otto G. Nestle, and all or each
 of them, from time to time as may be requested by
 Kessler & Company, of New York, to allow the said
 Kessler & Company to replace the securities so
 pledged as collateral to the indebtedness of Kessler
 & Company, of New York, to Kessler & Company,
 Limited, of Manchester, England, by other
 securities, providing that the total value of the said
 collaterals is not thereby lessened, except in proportion
 as the indebtedness is from time to time reduced,
 or as the same may vary from time to time.

IN WITNESS WHEREOF the said Kessler & Company,
 Limited, of Manchester, England, has caused 2807
 these presents to be signed in its corporate name by
 Henry Kessler, Chairman of the Board of Directors
 and of the Company, this 25th day of October, 1907.

KESSLER & COMPANY, LIMITED,

HENRY KESSLER,

Director.

Sworn and subscribed to }
 before me this 26th day }
 of October., 1907.

PHILIP F. W. AHRENS,

Notary Public.

We, the undersigned, North McLean, Albert 2808
 Kessler, Otto G. Nestle, do hereby accept the trust
 and agency conferred upon us by Kessler & Company,
 Limited, of Manchester, England, and agree
 to act faithfully as agents of the said Kessler &
 Company, Limited, in the premises.

IN WITNESS WHEREOF, we have hereunto subscribed
 our names this 25th day of October, 1907.

NORTH McLEAN,

ALB. KESSLER,

OTTO G. NESTLE.

2809 STATE OF NEW YORK, }
County of New York, } ss. :

On the 26th day of October, in the year 1907, before me personally came North McLean, Albert Kessler and Otto G. Nestle, to me known to be the individuals described in, and who executed the within instrument, and severally acknowledged that they executed the same for the purposes therein mentioned.

PHILIP F. W. AHRENS,
Notary Public,
New York County.

2810

2811

Kessler & Co., Ltd., Ex. V, Dec. 31/07, 2812
J. O. N.

32250

KESSLER & Co.

Due 8th Novr.

Exchange for
 £5000—

New York, Aug. 27, 1907.

Sixty days after sight of this First of Exchange
 (second unpaid), please pay to the order of

J. & P. Coats Ltd.

Five thousand pounds

Sterling

Value received and charge the same to account. 2813

To MESSRS. KESSLER & Co.,

LIMITED

KESSLER & Co.,

No. 202542 Manchester, 15/6 J.D.W. 8 Nov. 1907

Payable London

No. 291 Stamped £2.10.0.

Advised per Str. Oceanic. Accepted 6th September,
 1907.

A 441 & 90/165

Payable at Lloyds Bank, Limited

71, Lombard St., London

KESSLER & Co., LIMITED

H. KESSLER, Director.

Crossed Parr's Bank, Limited

2814

Not negotiable

Endorsed: For J. & P. Coats, Limited, W. P.
 Stewart, Director; Alex. J. D. Tait, Cashier.

Messrs. J. & P. Coats, Ltd., are admitted creditors
 for £5,000.15.6 in respect of this acceptance
 and protest.

Kessler & Co., Lim., in Liquidation.

FRANK YOUATT,

Liquidator.

December 4th, 1907.

Refer to acceptor

2815 **Kessler & Co., Ltd., Ex. W, Dec. 31/07,
J. O. N.**

Refer to acceptor 32251 Due 8th Novr.
Exchange for KESSLER & Co.
£5000.— New York, Aug. 27th, 1907.
Sixty days after sight of this FIRST of EXCHANGE
(second unpaid), please pay to the order of
J. & P. Coats, Ltd.,
Five Thousand pounds Sterling.

Value received and charge the same to account.
To MESSRS. KESSLER & Co.,

2816 LIMITED KESSLER & Co.,
Manchester 15/6 J.D.W. 8 Nov. 1907
No. 202543 Payable London.
No. 292 Stamped £2.10.0.

Advised per Str. Oceanic. Accepted 6th September, 1907.

A 441 & 90/166

Payable at Lloyds Bank, Limited

71, Lombard St., London

KESSLER & Co., LIMITED

H. Kessler, Director.

Crossed Parr's Bank, Limited

Not negotiable

2817 Endorsed: For J. & P. Coats, Limited, W. B. Stewart, Director; Alex. J. D. Taitt, Cashier.

Messrs. J. & P. Coats, Ltd., are admitted creditors for £5,000.15.6 in respect of this acceptance and protest.

Kessler & Co., Lim., in Liquidation.

FRANK YOUATT,

Liquidator.

December 4th, 1907.

Kessler & Co., Ltd., Ex. X, Dec., 31/07, 2818
J. O. N.

32253

KESSLER & CO.

Due 8th Novr.

Exchange for
 £5000.—

New York, Aug. 27, 1907.

Sixty days after sight on this FIRST of EXCHANGE
 (second unpaid), please pay to the order of
 J. & P. Coats, Ltd.,
 Five Thousand pounds Sterling. 2819
 Vaule received and charge the same to account.

To Messrs. KESSLER & Co.,

LIMITED

Manchester

Payable London

KESSLER & Co.,

15/6 J.D.W. 8 Nov. 1907

No. 202544

No. 293 Stamped £2.10.0.

Advised per Str. Oceanic.

A441 & 90/167 Accepted 6th September, 1907.

Payable at Lloyds Bank, Limited

71, Lombard St., London

KESSLER & Co., LIMITED

H. KESSLER, Director.

Crossed Parr's Bank, Limited

2820

Not negotiable

Endorsed: For J. & P. Coats, Limited, W. P.
 Stewart, Director; Alex. J. D. Taitt, Cashier.

Messrs. J. & P. Coats, Ltd., are admitted credi-
 tors for £5,000.15.6 in respect of this acceptance
 and protest.

Kessler & Co., Lim., in Liquidation.

FRANK YOUATT,

Liquidator.

December 4th, 1907.

Refer to acceptors

2821 **Kessler & Co., Ltd., Ex. Y, Dec. 31/07,
J. O. N.**

Due 8th Novr.

32253

Refer to acceptors

Exchange for
£5000.—

KESSLER & Co.

New York, Aug. 27, 1907.

Sixty days after sight on this FIRST of EXCHANGE
(second unpaid), please pay to the order of

J. & P. Coats, Ltd.,

2822

Five Thousand pounds Sterling.

Value received, and charge the same to account

To Messrs. KESSLER & Co.,

LIMITED

Manchester

payable London

No. 202545

No. 294 Stamped £2.10.0

KESSLER & Co.,

15/6 J.D.W. 8 Nov. 1907

Advised per Str. Oceanic. Accepted 6th September, 1907.

A 441 & 90/168

Payable at Lloyds Bank, Limited

71, Lombard St., London

KESSLER & Co., LIMITED

2823

H. Kessler, Director.

Crossed Parr's Bank, Limited

Not negotiable

Endorsed: For J. & P. Coats, Ltd., W. P. Stewart,
Director; Alex. J. D. Taitt, Cashier.

Messrs. J. & P. Coats, Ltd., are admitted creditors for £5,000.15.6 in respect of this acceptance and protest.

Kessler & Co., Lim., in Liquidation.

FRANK YOUATT,

Liquidator.

December 4th, 1907.

Kessler & Co., Ltd., Ex. Z, Dec. 31/07, 2824
J. O. N.

Exchange for
 £2500

KESSLER & Co.

New York July 31 1907

Ninety days after sight of the FIRST OF EX-
 CHANGE (second unpaid) please pay to the order of
 Anglo South American Bank Ltd twenty-five hun-
 dred pounds Sterling Value received and charge
 the same to account

To MESSRS. KESSLER & Co.,

KESSLER & Co.

LIMITED

Accepted 12th

Manchester

August 1907 payable at

2825

payable London

Lloyds Bank Limited

71 Lombard St. Lon-
 don

No. 202121

KESSLER & Co.

LIMITED. P. W. Kess-
 ler Director

Indorsed: The Anglo South American Bank Ltd.
 (formerly The Bank of Tarapaca and Argentina
 Ltd) A. J. Symons, Manager N. S. Sweet Sub. Ac-
 countant.

On the thirteenth day of November in the year of
 our Lord one thousand nine hundred and seven at
 the request of The Anglo South American Bank 2826
 Limited London—I William Crawley of the City
 of London, Notary Public duly admitted and sworn
 exhibited the original Bill of Exchange before
 copies to a Porter in the Bankinghouse of Lloyds
 Bank Limited No. 71 Lombard Street, London,
 where the said Bill is accepted payable and de-
 manded payment of its contents WHICH DE-
 MAND was not complied with but the said Porter
 thereunto answered "Refer to Acceptors."

WHEREUPON I the said Notary at the request
 aforesaid have protested and by these presents do

7827 solemnly protest against the Drawers and Acceptors of the said Bill and all others concerned for Exchange Re-Exchange and all Costs, Damages, Interest and Charges already incurred and to be hereinafter incurred for want of payment of the said Bill.

THUS DONE and protested in London aforesaid in the presence of Percy Watson Walker and Francis F. McArdle, Witnesses.

In testimonium Veritatis

WM. CRAWLEY

Not. Pub.

2828

**Kessler & Co., Ltd., Ex. AA, Dec. 31/07,
J. O. N.**

Exchange for
£2500

KESSLER & Co.

NEW YORK July 31 1907.

Ninety days after sight of the First of Exchange (second unpaid) please pay to the order of Anglo South American Bank Ltd twenty-five hundred pounds Sterling Value received and charge the same to account

To MESSRS. KESSLER & CO.,

KESSLER & Co.

LIMITED

Accepted 12th August

2826

Manchester

1907 payable at Lloyds

payable London

Bank Limited 71 Lombard St. London.

No. 202122

KESSLER & Co. LIMITED.

P. W. KESSLER

Director

Indorsed: The Anglo South American Bank Ltd. (formerly The Bank of Tarapaca and Argentina Ltd) A. J. Symons, Manager. N. S. Swce, Sub. Accountant.

On the thirteenth day of November in the year of our Lord one thousand nine hundred and seven

at the request of The Anglo South American Bank 2830
 Limited London—I, William Crawley, of the City
 of London, Notary Public, duly admitted and sworn
 exhibited the original Bill of Exchange before
 copies to a Porter in the Bankinghouse of Lloyds
 Bank, Limited, No. 71 Lombard Street, London,
 where the said Bill is accepted payable and demand-
 ed payment of its contents WHICH DEMAND was not
 complied with, but the said Porter thereunto an-
 swered "Refer to Acceptors."

WHEREUPON, I the said Notary, at the request
 aforesaid, have protested and by these presents do
 solemnly protest against the Drawers and Ac-
 ceptors of the said Bill and all others concerned 2831
 for Exchange, Re-Exchange and all Costs, Dam-
 ages, Interest and Charges already incurred and to
 be hereinafter incurred for want of payment of
 the said Bill.

THUS DONE and protested in London aforesaid
 in the presence of Percy Watson Walker and
 Francis F. McArdle, Witnesses.

In testimonium Veritatis,

WM. CRAWLEY,
 Not. Pub.

2833 **Kessler & Co., Ltd., Ex. BB, Dec. 31/07,
J. O. N.**

Exchange for
£2500

KESSLER & Co.
NEW YORK, July 31, 1907

Ninety days after sight of the First of Exchange (second unpaid) please pay to the order of Anglo South American Bank Ltd twenty-five hundred pounds Sterling. Value received and charge the same to account.

TO MESSRS. KESSLER & CO.,

KESSLER & CO.

LIMITED

Accepted 12th August

Manchester

1907 payable at Lloyds

2834

payable London

Bank Limited 71 Lombard St. London.

No. 202123

KESSLER & CO. LIMITED.

P. W. KESSLER

Director

Indorsed: The Anglo South American Bank Ltd. (formerly The Bank of Tarapaca and Argentine, Ltd). A. J. Symons, Manager, N. S. Sweet, Sub. Accountant.

E. B 698

P 12.

2835 On the thirteenth day of November, in the year of our Lord one thousand nine hundred and seven, at the request of The Anglo South American Bank, Limited, London—I, William Crawley, of the City of London, Notary Public, duly admitted and sworn exhibited the original Bill of Exchange before copies to a Porter in the Bankinghouse of Lloyds Bank, Limited, No. 71 Lombard Street, London, where the said Bill is accepted payable and demanded payment of its contents WHICH DEMAND was not complied with, but the said Porter thereunto answered "Refer to Acceptors."

WHEREUPON, I said Notary, at the request aforesaid, have protested and by these presents do

solemnly protest against the Drawers and Ac- 2836
ceptors of the said Bill and all others concerned
for Exchange, Re-Echange, and all Costs, Dam-
ages, Interest and Charges already incurred and to
be hereinafter incurred for want of payment of the
said Bill.

THUS DONE and protested in London aforesaid
in the presence of Percy Watson Walker and Fran-
cis F. McArdle, Witnesses.

In testimonium Veritatis,

WM. CRAWLEY,

Not. Pub.

2837

**Kessler & Co., Ltd., Ex. CC, Dec. 31/07,
J. O. N.**

Exchange for

KESSLER & Co.

£2500

NEW YORK, July 31, 1907

Ninety days after sight of the First of Exchange
(second unpaid) please pay to the order of Anglo
South American Bank, Ltd, twenty-five hundred
pounds Sterling Value received and charge the
same to account

KESSLER & Co.

To MESSRS. KESSLER & Co.,

LIMITED

Accepted 12th August 2838

Manchester

1907 payable at Lloyds

payable London

Bank Limited 71 Lomb-

No. 202124

bard St. London.

KESSLER & Co. LIMITED,

P. W. KESSLER

Director

Indorsed: The Anglo South American Bank, Ltd.
(formerly The Bank of Tarapaca and Argentina
Ltd). A. J. Symons, Manager, N. S. Swee, Sub.
Accountant.

On the thirteenth day of November, in the year
of our Lord one thousand nine hundred and seven,

2839 at the request of The Anglo South American Bank, Limited, London—I, William Crawley, of the City of London, Notary Public, duly admitted and sworn exhibited the original Bill of Exchange before copies to a Porter in the Bankinghouse of Lloyds Bank, Limited, No. 71 Lombard Street, London, where the said Bill is accepted payable and demanded payment of its contents WHICH DEMAND was not complied with, but the said Porter thereunto answered "Refer to Acceptors."

2840 WHEREUPON, I the said Notary, at the request aforesaid, have protested and by these presents do solemnly protest against the Drawers and Acceptors of the said Bill and all others concerned for Exchange, Re-Echange, and all Costs, Damages, Interest and Charges already incurred and to be hereinafter incurred for want of payment of the said Bill.

THUS DONE and protested in London aforesaid in the presence of Percy Watson Walker and Francis F. McArdle, Witnesses.

In testimonium Veritatis,

WM. CRAWLEY,

Not. Pub.

2841

Kessler & Co., Ltd., Ex. DD, Dec. 31/07, 3842
J. O. N.

Copy.

Exchange for £5000 Kessler & Company.

New York, October 15, 1907.

Advice as per Steamer Teutonic.

Ninety days after sight this first of exchange
(second unpaid) please pay to the order of Colonial
Bank five thousand pounds sterling, value received,
and charged the same to account.

KESSLER & COMPANY.

To Messrs. KESSLER & COMPANY,

2843

LIMITED, Manchester.

Payable London.

No. 203,265.

On the face appears the following:

"Accepted, 25th of October, 1907. Payable at
Lloyds Bank, Limited, 71 Lombard St.

KESSLER & CO., LIMITED,

J. W. KESSLER,

Director."

It is indorsed:

"The Colonial Bank is admitted a creditor for
five thousand pounds in respect to this acceptance.

December 16, 1907.

2844

KESSLER & CO., LTD.,

FRANK YOUATT,

Liquidator."

It also carries a cancelled English revenue
stamp for £2/10.

9
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5

2845

**Kessler & Co., Ltd., Ex. FF, Feb. 1/08,
J. O. N.**

Copy

Exchange for £2500. KESSLER & CO.

NEW YORK, Sept. 16, 1907.

Ninety days after sight of this First of Exchange
(second unpaid) please pay to the order of Uhl-
felder, Thompson & Co. Twenty five hundred
Pounds Sterling Value received and charge the
same to account KESSLER & CO.

To Messrs. Kessler & Co, Limited

2846

Manchester,

No. 202836

Payable London

(299)

Accepted 24th Sept 1907 payable at Lloyd's
Bank Limited 71 Lombard St London, Kessler & Co
Limited T W Kessler Director.

Advised per Str Kronprincessin Cecilie. £2500

Endorsed. Pay the Anglo Foreign Banking Co,
Limited or order Value in account New York Sep
16 1907 Uhlfelder, Thompson & Co D G G Levich
Partner * * * * The Anglo Foreign Banking
Co Ltd. are admitted creditors for £2500.0.0 in re-
spect of this acceptance December 6th 1907 Kessler
& Co Limd in Liquidation Frank Youatt Liquidator
Per Pro the Anglo Foreign Banking Co Limited Geo
B Jarvis per Manager.

2847

Exchange for £2500. Kessler & Co

2848

NEW YORK, Sept 16 1907

Ninety days after sight of this First of Exchange
(second unpaid) please pay to the order of Uhl-
felder Thompson & Co Twenty five hundred Pounds
Sterling Value received and charge the same to
account

KESSLER & CO.

To Messrs. Kessler & Co, Limited

Manchester,

No. 202837 Payable London

(300)

Accepted 24th Sept 1907 payable at Lloyd's
Bank Limited 71 Lombard St London Kessler & Co. 2849
Limited, T. W. Kessler, Director.

(Endorsed) Pay the Anglo Foreign Banking Co
Limited or order Value in account New York Sep
16 1907 Uhlfelder Thompson & Co. D G G Levich
Partner * * * * The Anglo Foreign Banking
Co Ltd. are admitted creditors for £2500 in respect
of this acceptance December 6 1907 Kessler & Co
Lim. in liquidation Frank Youatt Liquidator Per
Pro The Anglo Foreign Banking Co Limited Geo B
Jarvis per Manager.

2850

Advised per Str. Kronprincessin Cecilie. £2500.

2851 Exchange for £2500 Kessler & Co

NEW YORK Sept 16 1907

Ninety days after sight of this First of Exchange
(second unpaid) please pay to the order of Uhl-
felder Thompson & Co Twenty five hundred Pounds
Sterling Value received and charge the same to
account

KESSLER & Co

To Messrs Kessler & Co Limited
Manchester

No. 202838 Payable London

Accepted 24th Septr 1907 payable at Lloyd's
Bank Limited 71 Lombard St London, Kessler &
Co Limited T. W. Kessler Director.

2852

(Endorsed) Pay the Anglo Foreign Banking Co
Limited or order Value in account New York Sept
16 1907 Uhlfelder Thompson & Co D G G Levich
Partner. * * * The Anglo Foreign Banking
Co Ltd are admitted creditors for £2500—in respect
of this acceptance December 6th 1907 Kessler & Co
Lim in Liquidation Frank Youatt Liquidator Per
Pro The Anglo Foreign Banking Co Limited Geo B
Jarvis Per Manager.

2853

Advised per Str Kronprincessin Cecilie. £2500

Copy

2854

Exchange for £2500. Kessler & Co.

NEW YORK, Sept. 16, 1907.

Ninety days after sight of this First of Exchange (second unpaid) please pay to the order of Uhlfelder, Thompson & Co. Twenty five hundred Pounds Sterling Value received and charge the same to account

KESSLER & Co.

To Messrs. Kessler & Co Limited
Manchester,
No. 202839 Payable London
(302)

Accepted 24th Septr 1907 payable at Lloyds Bank Limited 71 Lombard St London Kessler & Co Limited T W Kessler, Director.

Endorsed. Pay the Anglo Foreign Banking Co, Limited or order Value in account New York Sep 16 1907 Uhlfelder, Thompson & Co D G G Levich Partner. * * * The Anglo Foreign Banking Co Ltd. are admitted creditors for £2500.0.0 in respect of this acceptance December 6th 1907 Kessler & Co Limd in Liquidation Frank Youatt Liquidator Per Pro the Anglo Foreign Banking Co Limited Geo B Jarvis per Manager.

2856

£2500
Cecillie.
Kronprinzessin
Ztr
Advised per

2857 Exchange for £2500. Kessler & Co.

NEW YORK Sept 16 1907

£2500
Ninety days after sight of this First of Exchange
(second unpaid) please pay to the order of Uhl-
felder Thompson & Co Twenty five hundred
Pounds Sterling Value received and charge the same
to account KESSLER & Co.

To Messrs. Kessler & Co, Limited
Manchester,
No. 202840 Payable London
(303)

2858 Accepted 24th Septr 1907 payable at Lloyd's
Bank Limited 71 Lombard St London Kessler & Co.
Limited, T. W. Kessler, Director.

Advised per Str Kronprincessin Cecilie.
(Endorsed) Pay the Anglo Foreign Banking Co
Limited or order Value in account New York Sep 16
1907 Uhlfelder Thompson & Co. D G G Levich
Partner * * * * The Anglo Foreign Banking
Co Ltd. are admitted creditors for £2500 in respect
of this acceptance December 6 1907 Kessler & Co
Lim. in liquidation Frank Youatt Liquidator Per
Pro The Anglo Foreign Banking Co Limited Geo
B Jarvis per Manager.

2859

Exchange for £2500

Kessler & Co

2860

NEW YORK Sept 16 1907

Ninety days after sight of this First of Exchange
(second unpaid) please pay to the order of Uhl-
felder Thompson & Co Twenty five hundred Pounds
Sterling Value received and charge the same to
account Kessler & Co

To Messrs Kessler & Co Limited
Manchester

No. 202841 Payable London (304)

Accepted 24th Sept 1907 payable at Lloyd's
Bank Limited 71 Lombard St London, Kessler &
Co Limited, T. W. Kessler, Director.

2861

(Endorsed) Pay the Anglo Foreign Banking
Co Limited or order Value in account New York
Sept 16 1907 Uhlfelder Thompson & Co D G G
Levich Partner * * * * The Anglo Foreign
Banking Co Ltd are admitted creditors for £2500—
in respect of this acceptance December 6th 1907
Kessler & Co Lim in Liquidation Frank Youatt
Liquidator Per Pro The Anglo Foreign Banking
Co Limited George B Jarvis per Manager.

2862

2863 **Kessler & Co., Ltd., Ex. FF, Feb. 1/08,**
J. O. N.

(One Shilling Stamp)

I, George Frederick Warren of the City of London Notary Public by Royal Authority duly admitted and sworn DO HEREBY CERTIFY to whom it may concern that the paper writings hereunto annexed contain true and faithful copies of the six original Bills of Exchange whereof they purport to be copies I having compared the said annexed copies with the said original Bills of Exchange and found the same to agree therewith in every respect.

2864 Whereof an Act being required I have granted these Presents under my Notarial Firm and Seal to serve and avail when and where need may require.

London, the first day of January
 in the Year of our Lord One thousand
 nine hundred and eight.

(Notary Seal)

(S'd) G. F. WARREN.
 Notary Public.

2865 **Kessler & Co., Ltd., Ex. GG, Feb. 1/08,**
J. O. N.

CONSULATE-GENERAL OF THE UNITED STATES OF
 AMERICA FOR GREAT BRITAIN & IRELAND
 AT LONDON.

I, Robert J Wynne Consul General of the United States of America at London, England do hereby make known and certify to all whom it may concern

that George Frederick Warren, who hath signed the 2866
annexed certificate, is a Notary Public, duly ad-
mitted and sworn and practicing in the City of
London, aforesaid, and that to all acts by him so
done full faith and credit are and ought to be given
in Judicature and thereout.

[SEAL] IN TESTIMONY WHEREOF I have hereunto
set my hand and affixed my seal of Office
at London aforesaid, this second day of
January in the year of our Lord One
Thousand Nine Hundred and Eight.

ROBERT J WYNNE,

Consul General.

2867

(\$2 American Consular Service Fee Stamp, Can-
celled).

(Six one shilling stamps)

ON THE twenty-seventh day of December One
thousand nine hundred and seven at the request
of the Anglo Foreign Banking Company Limited
London bearers of the six bills of exchange copied
on the other side hereof, I George Frederick War-
ren of the City of London Notary Public by Royal
Authority duly admitted and sworn went to Lloyds
Bank Limited No. 71 Lombard Street in this City 2868
where the said six bills of exchange are made pay-
able by the acceptance and speaking to a clerk I
exhibited unto him the said six bills of exchange
and demanded payment thereof whereunto he an-
swered "No orders".

Therefore I the said Notary at the request afore-
said have protested and by these presents do sol-
emnly protest as well against the drawers and ac-
ceptors of the said six bills of exchange as against
all others whom it may concern for exchange re-ex-
change and all costs charges damages and interest

2869 suffered and to be suffered for want of payment of
the said six bills of exchange.

Protest £3.15—

Provg Consular
legality
& paid fee

}
—14—

£4/9—

THUS DONE and pro-
tested in London
in the presence of
George Franklin and
Walter Joseph Nor-
wood, witnesses.

G. F. WARREN,

[SEAL]

Notary Public.

2870

2871

Kessler & Co., Ltd., Ex. HH, Feb. 1/08, 2872
J. O. N.

26 DEC

Exchange for £5000. KESSLER & Co JM&Co No 2885

NEW YORK SEPT 16 1907

5000 Ninety days after sight of this First
of Exchange (second unpaid) please
Advised pay to the order of John Munroe & Co
Per Str Five thousand Pounds Sterling Value
Kronprin- received and charge the same to ac-
zessin account

Cecilie.

KESSLER & Co

To Messrs. KESSLER & Co

2873

Limited

Manchester

K & CO Ltd 97

Payable London.

No 202828 25 12

Stamp Accepted 24th Sept 1907 Payable at

£2.10— Lloyds Bank Limited 71 Lombard

Foreign Bill St London.

15/6 GWF 27 Dec 1907

15/6 Duplicate protest

13/10 Procuring consular

legality & paid fee.

KESSLER & Co Limited

2874

(signed) T. W. KESSLER Director

Endorsed: Pay to Messrs Alexanders & Co Limited
or order

Per Pro John Munroe & Co

(Signed) W. A. Burnham

For Alexanders & Co Limited

(Signed) W. P. Alexander Director.

2875 Exchange for £5000. KESSLER & Co 26 DEC

JM&CO No. 2884.

NEW YORK SEPT 16 1907.

5000 Ninety days after sight of this First
of Exchange (second unpaid) please
Advised pay to the order of John Munroe & Co
Per Str Five thousand Pounds Sterling Value
Kronprin- received and charge the same to ac-
zessin count
Cecilie. (Signed) KESSLER & Co

To Messrs. KESSLER & Co
Limited

2876

Manchester

Payable London.

No. 202829

25 12

15/6 GFW 27 Dec 1907

15/6 Dupli protest

Stamp

13/10 Procuring

£.10—

Consular legality

Foreign Bill

& paid fee.

Accepted 24th Sept 1907 Payable at

Lloyds Bank Limited 71 Lombard st London

KESSLER & Co Limited

(Signed) T. W. KESSLER Director.

2877 Endorsed: Pay to Messrs Alexanders & Co Limited
or order

Per Pro John Munroe & Co

(Signed) W. A. Burnham

For Alexanders & Co Limited

(Signed) W. P. Alexander Director.

(One Shilling Stamp)

2878

I, GEORGE FREDERICK WARREN of the City of London Notary Public by Royal Authority duly admitted and sworn Do Hereby Certify to whom it may concern that the paper writings hereunto annexed contain true and faithful copies of the two original Bills of Exchange whereof they purport to be copies I have compared the said annexed copied with the said Original Bills of Exchange and found the same to agree in every respect

Whereof an Act being required I have granted these Presents under my Notarial Firm and Seal to serve and avail when and where need may require. 2879

[NOTARY SEAL] London the first day of January in the year of our Lord One thousand nine hundred and eight.

S'd G. F. WARREN
Notary Public.

2880

2881 **Kessler & Co., Ltd., Ex. JJ, Feb. 1/08,
J. O. N.**

CONSULATE-GENERAL OF THE UNITED STATES OF
AMERICA FOR GREAT BRITAIN & IRELAND AT
LONDON.

I, ROBERT J. WYNNE, Consul General of the
United States of America at London, England, do
hereby make known and certify to all whom it may
concern that George Frederick Warren hath
signed the annexed Certificate, is a Notary Public,
duly admitted and sworn and practising in the city
2882 of London, aforesaid, and that to all acts by him
so done full faith and credit are and ought to be
given in Judicature and thereout.

In Testimony Whereof, I have hereunto set my
hand and affixed my seal of Office at London afore-
said, this Second day of January in the year of our
Lord One Thousand Nine Hundred and eight.

(S'd) ROBERT J. WYNNE,

[CONSULATE SEAL.]

Consul-General.

[\$2 Fee Stamp.]

Similar certificate for other draft of Exhibit III.

DUPLICATE.

2883 (One Shilling Stamp.)

On the twenty seventh day of December One
thousand nine hundred and seven at the request
of Alexanders & Company Limited of London Ban-
kers bearers of the bill of exchange copied on the
other side hereof I George Frederick Warren of the
City of London Notary Public by Royal authority
duly admitted and sworn went to Lloyds Bank Lim-
ited No. 71 Lombard Street in this City where the
said bill of exchange is made payable by the accept-
ance and speaking to a clerk I exhibited unto him
the said bill of exchange and demanded payment
thereof whereunto he answered "No orders." There-

fore I the said Notary at the request aforesaid have²⁸⁸⁴
 protested and by these presents do solemnly pro-
 test as well against the Drawers and Acceptors of
 the said bill of exchange as against all others whom
 it may concern for exchange re-exchange and all
 costs charges damages and interest suffered and to
 be suffered for want of payment of the said bill
 of exchange.

Protest	15- 6	DONE and protested	
Duplicate Protest . .	15- 6	in London in the	
Procg Consular . . .	13-10	presence of George	
		Franklin and Walter	
	£2- 4-10	Joseph Norwood Wit-	²⁸⁸⁵
legality & paid fee.		nesses.	

[NOTARY SEAL.]

(S'd) G. F. WARREN
 Notary Public.

Similar certificate of protest for other draft of
 Exhibit HH.

CONSULATE-GENERAL OF THE UNITED STATES OF
 AMERICA FOR GREAT BRITAIN & IRELAND AT
 LONDON.

I, ROBERT J. WYNNE, Consul-General of the
 United States of America at London, England, do²⁸⁸⁶
 hereby make known and certify to all whom it
 may concern that George Frederick Warren who
 hath signed the annexed Certificate, is a Notary
 Public, duly admitted and sworn and practising in
 the city of London, aforesaid, and that to all acts
 by him so done full faith and credit are and ought
 to be given in Judicature and thereout.

In Testimony Whereof I have hereunto sent my
 hand and affixed my seal of Office at London afore-

2887 said, this Second day of January in the year of
our Lord One Thousand Nine Hundred and eight.
(U. S. Consulate Seal.)

[U. S. CONSULATE SEAL.]

(S'd) ROBERT J. WYNNE,
Consul-General.

(\$2 Fee Stamp.)

Duplicate.

(One Shilling Stamp)

On the twenty seventh day of December One
thousand nine hundred and seven at the request of
Alexanders & Company Limited of London
2888 Bankers bearers of the bill of exchange
copied on the other side hereof, I, George
Frederick Warren of the City of London
Notary Public by Royal authority duly ad-
mitted and sworn went to Lloyds Bank Limited No.
71 Lombard Street in this City where the said
bill of exchange is made payable by the acceptance
and speaking to a clerk I exhibited to him the
said bill of exchange and demanded payment
thereof whereunto he answered "No orders."
Therefore I, the said Notary, at the request afore-
said have protested and by these presents do
solemnly protest as well against the Drawers and
2889 Acceptors of the said bill of exchange as against
all others whom it may concern for exchange re-
exchange and all costs charges damages and inter-
est suffered and to be suffered for want of pay-
ment of the said bill of exchange.

Protest 15- 6 DONE and protested in
Duplicate Protest 15- 6 London in the presence
Procg Consular. .13-10 of George Franklin and

———— Walter Joseph Nor-
wood Witnesses.

legality & paid fee.

(S'd) G. F. WARREN

[NOTARY SEAL]

Notary Public.

Kessler & Co., Ltd., Ex. KK, Feb. 1/08, 2890
J. O. N.

CONSULATE-GENERAL OF THE UNITED STATES OF
 AMERICA FOR GREAT BRITAIN & IRELAND
 AT LONDON.

I, Richard Westacott, Vice and Deputy Consul General of the United States of America at London, England do hereby make known and certify to all whom it may concern that John Edward Newton who hath signed the annexed Certificate is a Notary Public duly admitted and sworn and practising in the City of London, aforesaid, and that to all acts by him so done full faith and credit are and ought to be given in Judicature and thereout. 2891

In Testimony Whereof, I have hereunto set my hand and affixed my seal of Office at London aforesaid, this nineteenth day of December in the year of our Lord One Thousand Nine Hundred and seven.

(S'd) RICHARD WESTACOTT

(\$2 fee Stamp) Vice and Deputy Consul General.

(One Shilling Stamp)

2892

United Kingdom of Great Britain and }
 Ireland England. City of London. } ss.

I, JOHN EDWARD NEWTON, NOTARY PUBLIC, by Royal authority duly admitted and sworn, practising in London, DO HEREBY CERTIFY unto all whom it shall or may concern that the Paper writings hereunto annexed, marked respectively with the letters "A", "B", "C" and "D" are faithful and accurate copies of four certain Original Bills of Exchange, which were to me Notary this day pro-

2893 duced, and wherewith the said annexed copies
respectively agree word for word and in every particular.

WHEREOF AN ACT being required, I the said Notary have
[NOTARY SEAL] granted these Presents under my
Notarial Firm and Seal of Office
to serve and avail as occasion
shall or may require. DONE AND
PASSED in LONDON this eighteenth
day of December One thousand
nine hundred and seven.

2894 In testimonium veritatis
(S'd) JOHN E. NEWTON
Notary Public London.

2895

"A"

2896

(One Shilling Stamp)

Exchange for £5000. Kessler & Co. Jan. 3

Foreign
bill

NEW YORK, Sept 24 1907.

stamp
£2.Ninety days after sight of this First of Exchange
(second unpaid) please pay to the order of W. L. S.Foreign
bill stampJackson & Co Five thousand pounds Sterling
Value received and charge the same to account

10/-

[Credit Industrial & Commercial London Agency
1930]

Advised

per Str.

To Messrs KESSLER & Co 310

Oceanic.

LIMITED.

KESSLER & Co.

K. & Co. Ltd.

289

305 No. 202965 Manchester. Payable London.
Accepted 2nd October 1907 Payable at
Lloyds Bank, Limited 71 Lombard St London.

KESSLER & Co LIMITED

T. W. KESSLER Director.

Endorsed

Pay to the order of Union Discount Co of Lon-
don Ltd W. L. S. Jackson & Co * * * * J.
C. P., For the Union Discount Company of Lon-
don Limited, J. C. Peace, H. R. Hallward pro Man-
ager. The Union Discount Company of London
Ltd is admitted a creditor for £5000 in respect of
this acceptance December 6th 1907. Kessler & Co
Lim in liquidation Frank Youatt Liquidator.

289

2899

"B"

(One Shilling Stamp)

Foreign	Exchange for £5000.	
bill	Kessler & Co.	Jan. 3
stamp £2	NEW YORK, Sept. 24, 1907.	
Foreign	Ninety days after sight of this first	
bill	of Exchange (second unpaid) please	
stamp 16/.	pay to the order of W. L. S. Jackson	
Advised	& Co Five thousand pounds Sterling	
per Str.	Value received and charge the same	
Oceanic.	to account	A 3949
		310

To Messrs Kessler & Co
2900 Limited.

Kessler & Co.

[K&Co. Ltd No. 202966. Manchester.
306 Payable London.

Accepted 2nd October 1907 Pay-
able at Lloyds Bank Limited 71
Lombard St London

KESSLER & CO LIMITED

T. W. Kessler, Director.

Endorsed—Pay to the order of Union Discount Co
of London Ltd W. L. S. Jackson & Co. * *
* J. C. P. For the Union Discount Company
2901 of London Limited J. C. Peace H. R. Hall-
ward pro Manager. The Union Discount Com-
pany of London Ltd is admitted a Creditor for
£5000 in respect of this acceptance December
6th, 1907 Kessler & Co Lim in liquidation
Frank Youatt Liquidator.

(One Shilling Stamp)

Foreign Exchange for £5000.
 bill Kessler & Co. 3rd Jan.
 stamp £2 NEW YORK, Sept 24 1907.
 Foreign Ninety days after sight of this first
 bill of Exchange (second unpaid) please
 stamp 10/. pay to the order of W. L. S. Jackson
 Advised & Co Five thousand pounds Sterling
 per Str. Value received and charge the same
 Oceanic. to account

310

To Messrs Kessler & Co
 Limited.

2908

Kessler & Co.

[K&Co. Ltd No. 202967. Manchester.
 307 Payable London.

Accepted 2nd October 1907 Pay-
 able at Lloyds Bank Limited 71
 Lombard St London.

KESSLER & CO LIMITED

T. W. Kessler Director.

Endorsed—Pay to the order of Union Discount Co
 of London Ltd W. L. S. Jackson & Co. For
 the Union Discount Company of London
 Limited J. C. Peace H. R. Hallward pro Man- 2904
 ager. The Union Discount Company of Lon-
 don Ltd is admitted a Creditor for £5000 in
 respect of this acceptance December 6th 1907
 Kessler & Co Lim in liquidation Frank Youatt
 Liquidator. In need with Union Discount
 Company of London Limited.

2905

"D"

(One Shilling Stamp)

Foreign	Exchange for £5000.	
bill	Kessler & Co.	Jan. 3
stamp £2		NEW YORK, Sept 24 1907.
Foreign	Ninety days after sight of this first	
bill	of Exchange (second unpaid) please	
stamp 10/.	pay to the order of W. L. S. Jackson	
Advised	& Co Five thousand pounds Sterling	
per Str.	Value received and charge the same	
Oceanic.	to account	A 3948

310

2906 To Messrs Kessler & Co
Limited.

Kessler & Co.

[K&Co. Ltd No. 202968
308

Manchester.

Payable London.

Accepted 2nd October 1907 Pay-
able at Lloyds Bank Limited 71
Lombard St London

KESSLER & CO LIMITED.

T. W. Kessler Director.

Endorsed—Pay to the order of Union Discount Co
of London Ltd W. L. S. Jackson & Co. * *

2907 * J. C. P. For the Union Discount Company
of London Limited J. C. Peace H. R. Hall-
ward pro Manager. The Union Discount Com-
pany of London Ltd is admitted a Creditor for
£5000 in respect of this acceptance December
6th, 1907 Kessler & Co Lim in liquidation
Frank Youatt Liquidator.

Kessler & Co., Ltd., Exhibit LL, Feb. 1, 2908
08, J. O. N.

(Copy)

Exchange for £5000

Kessler & Co Jan. 6 No. 2884

NEW YORK Sept. 16 1907

Advice per Str	Ninety days after sight of this	
Kronprinzessen	First of Exchange (second un-	
Cecile	paid) please pay to the order of	
	John Monroe & Co Five thousand	
5000	pounds Sterling Value received	
	and charge same to account.	2909

KESSLER & Co

To Messrs Kessler & Co. Limited
 No. 202829

Manchester Payable London.
 Accepted 24th Sept 1907 Payable
 at Lloyds Bank Limited 71 Lombard St London Kessler & Co
 Limited T. W. Kessler Director
 (Endorsed) Pay to Messrs Alexanders & Co Limited or order
 Per Pro John Monroe & Co. W.
 A. Burnham For Alexanders &
 Co Ltd W. P. Alexander Director.

2910

2911

(Copy)

Exchange for £5000

Kessler & Co Jan. 6 No. 2885

NEW YORK Sept. 16 1907

Advice per Str
Kronprinzessen
Cecile

5000

Ninety days after sight of this
First of Exchange (second un-
paid) please pay to the order of
John Monroe & Co Five thousand
pounds Sterling Value received
and charge same to account

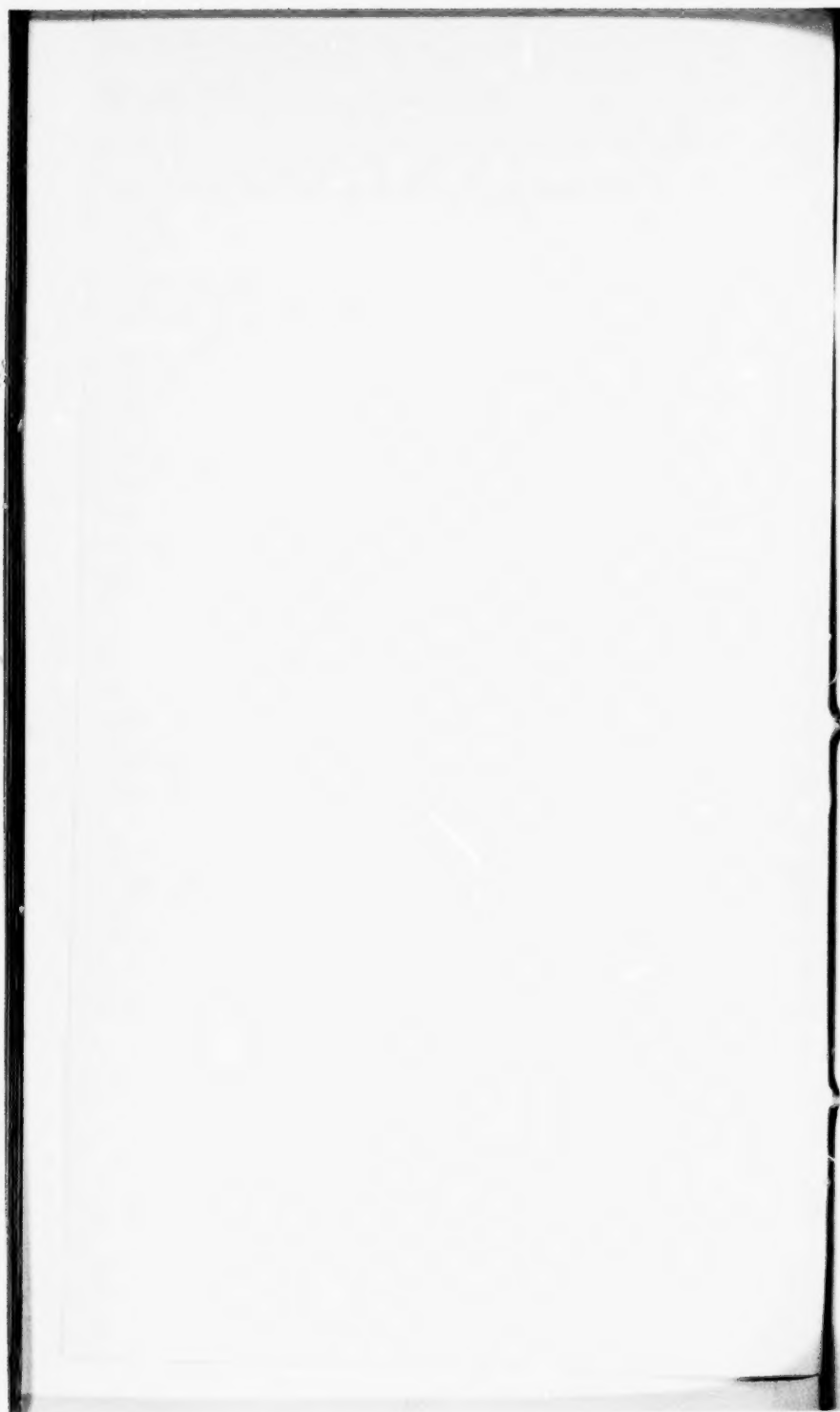
KESSLER & Co

To Messrs. Kessler & Co. Limited

2912 No. 202828

Manchester Payable London.
Accepted 24th Sept 1907 Payable
at Lloyds Bank Limited 71 Lombard St London Kessler & Co Limited T. W. Kessler Director (Endorsed) Pay to Messrs Alexanders & Co Limited or order Per Pro John Monroe & Co. W. A. Burnham For Alexanders & Co Ltd W. P. Alexander Director.

2913



Kessler & Co., Ltd., Exhibit OO, Feb. 2917
11/08, J. O. N.

17 Feb. 3.

Private.

MESSRS. KESSLER & Co.,
 New York:

DEAR SIRs—We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to provide this immediately, and as we in no way wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30th of June of this year, by which date the necessary securities should be set aside for us and a list sent to us. We do not propose to name a fixed amount of credit; suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced. 2918

We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for and we remain, dear Sirs,

Yrs very truly,

P. W. KESSLER. 2919

Kessler & Co., Ltd., Ex. QQ, Feb 17 08,
J. O. N.

ITEM I.

\$25,000.00 par value ORLEANS COUNTY QUARRY COMPANY. First Mortgage Coupon, 6% Gold Bonds, numbered 25, 24, 23, 22, 21, 20, 69, 68, 67, 66, 65, 64, 63, 62, 61, 60, 59, 58, 57, 56, 55, 54, 53, 52, 51, payable to bearer, not registered. Coupon No.

2920 4, April, 1908, attached, with coupons subsequent.
Par value \$1,000 each.

The Bond recites that the Orleans County Quarry Company is a New York Corporation. Trustee, The Trust Company of America.

ITEM II.

Note signed Milne, Turnbull & Company, dated July 11, 1907, payable four months after date, \$16,000.00, to the order of Kessler & Company, at office of Kessler & Co., 54 Wall Street, New York. Endorsed in blank "Kessler & Company."

2921

ITEM III.

Note signed Milne, Turnbull & Company, dated August 27, 1907, payable four months after date, \$7,000.00, to the order of Kessler & Company, at office of Kessler & Company, 54 Wall Street, New York, endorsed in blank "Kessler & Company."

ITEM IV.

Note signed Milne, Turnbull & Company, dated August 27, 1907, payable four months after date, 2922 \$17,000.00, to the order of Kessler & Company, at office of Kessler & Company, 54 Wall Street, New York, endorsed in blank, "Kessler & Company."

ITEM V.

Note signed R. B. Maclea Company, R. K. Maclea, Treasurer, dated August 5, 1907, four months, \$5,000.00, to the order of Kessler & Company, at office of Kessler & Company, 54 Wall Street, New York, endorsed in blank, "Kessler & Company."

ITEMS VI AND VII.

CRIPPLE CREEK CENTRAL RAILWAY COMPANY STOCK.

Certificates for **PREFERRED STOCK**, The Cripple Creek Central Railway Company, as follows:

No. 180,—100 shares preferred Stock, in name of George Meyer, dated May 29, 1906, endorsed in blank as follows: "Kessler & Company," "in presence of Albert Katt," endorsement dated June 1st, 1906, said endorsement being in blank, under usual printed power of transfer on stock Certificates.

No. 177, ditto.

No. 178, ditto.

No. 179, ditto.

Certificate numbered A-1015, 60 shares, dated August 20, 1906, name of Albert Katt, endorsed in blank, "Albert Katt, Kessler & Company," "in presence of Albert Heyne," date of endorsement being August 1, 1906. 2924

Certificate numbered A-946, 6 shares Preferred Stock, in name of Albert Katt, dated May 18, 1906, endorsed in blank May, 18, 1906, "Albert Katt, Kessler & Company," "In presence of Albert Heyne."

Certificates for **COMMON STOCK**, The Cripple Creek Central Railway Company, as follows:

No. B-172, 100 shares, May 29, 1906, in name of George Meyer, endorsed June 1, 1906, "George Meyer, Kessler & Company, in the presence of Albert Katt." 2925

No. B-173, ditto, same name, date and endorsement.

No. B-174, ditto, same name, date and endorsement.

GENERAL ESCROW.

ITEM L.

The following certificates of **UNITED LIGHTING & HEATING COMPANY**, a New Jersey Corporation.

No. 203, 10 shares Common, name of Albert Heyne, dated June 7, 1899, endorsed in blank with-

2926 out date, "Albert Heyne," "sealed and delivered in the presence of William E. Magie."

No. 204, 490 shares, name of James W. Escher, June 7, 1899, endorsed in blank without date, "James W. Escher," "sealed and delivered in presence of William E. Magie."

No. 205—310 shares Common, same name, same date and endorsement as 204.

No. 207—200 shares Common, name of Rudolf E. F. Flinsch, June 7, 1899, endorsed in blank without date, "Rudolf E. F. Flinsch," "sealed and delivered in presence of William E. Magie."

2928 208—200 shares Common, June 7, 1899, Alfred Kessler, endorsed in blank without date, "Alfred Kessler," "sealed and delivered in presence of William E. Magie."

No. 209.—50 shares Common, dated June 7, 1899, name of Philip Ahrens, endorsed in blank without date, "Philip Ahrens, sealed and delivered in presence of William E. Magie."

No. 213.—333 shares common, dated June 7, 1899, name of Otto G. Nestle, endorsed in blank without date, "Otto G. Nestle, sealed and delivered in presence of William E. Magie."

No. 214.—333 shares Common, same as 213 as to name and endorsement and date.

2928 No. 215.—23 shares Common, same as Nos. 213 and 214 as to name endorsement and date.

No. 287.—100 shares Common dated November 22, 1901, name of Philip Ahrens, endorsed in blank "Philip Ahrens, November 26, 1901, sealed and delivered in presence of William E. Magie."

No. 288.—100 shares Common, same as to name, date and endorsement as 287.

No. 289.—100 shares Common, same as to name, date and endorsement as 288.

No. 290.—100 shares Common, same as to name, date and endorsement as 289.

No. 292.—15 shares Common, name of Philip

Ahrens, dated November 22, 1901, endorsed in 2929
blank, "Philip Ahrens, November 26, 1901, sealed
and delivered in presence of William E. Magie."

No. 293.—64 shares Common, name of Philip
Ahrens, dated November 22, 1901, endorsed in
blank, "Philip Ahrens, November 26, 1901, sealed
and delivered in presence of William E. Magie."

ITEM II.

DAIMLER MANUFACTURING COMPANY, New York
Corporation, par value shares \$100.00:

Certificate A-4, 100 shares Preferred stock, dat-
ed December 2, 1901, name of Otto G. Nestle, Sec- 2930
retary, endorsed in blank without date, "Otto G.
Nestle, Secretary, Witness, Theodore Lurman."

(Note.—The officers signing this certificate are
Otto G. Nestle, Secretary; A. R. Allen, President.)

Certificate A-5.—100 shares preferred, same
name, date and endorsement as A-4.

Certificate A-6.—100 shares Preferred, same
name, date and endorsement as A-5.

Certificate A-7.—100 shares Preferred, same
name, date and endorsement as A-6.

A-8.—100 shares Preferred, same name, date
and endorsement as A-7.

A-9.—100 shares preferred, same name, date 2931
and endorsement as A-8.

A-10.—100 shares Preferred, same name, date
and endorsement as A-9.

A-11.—100 shares Preferred, same name, date
and endorsement as A-10.

A-12.—100 shares Preferred, same name, date
and endorsement at A-11.

A-20.—100 shares preferred, dated December
18, 1901, name of Otto G. Nestle, Secretary, en-
dorsed in blank without date, "Otto G. Nestle,
Secretary, Witness, W. E. Magie."

2932 A21.—100 shares Preferred, same name, date and endorsement as A-20.

A 22.—100 shares Preferred, same name, date and endorsement as A-21.

A 23.—60 shares Preferred, same name, date and endorsement as A-22.

A-13.—81 shares Preferred, dated December 2, 1901, name of Otto G. Nestle, Secretary, endorsed in blank without date, "Otto G. Nestle, Secretary, Witness, Theodore Lurman."

ITEM III.

The following Bonds UNITED BREWERIES COMPANY First Mortgage Bond, par value \$1,000.00, 6%. Interest payable February and August 1st; Bonds payable to bearer or in case of registry to the registered owner.

February, 1908, coupon No. 19, for \$30.00 attached and subsequent coupons.

No. 2070 *not* registered payable to bearer.

No. 2051 *not* registered payable to bearer.

No. 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 1676, 472, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 2995, 2996, 2997, 2998, 2999, 2934 3000, 3001, 3002, 819, 820, 821, 822, 823, 824, 825, 2661, 2662, 2663.

None of the above are registered.

ITEM IV.

FOUR NOTES, UNITED BREWERIES COMPANY, as follows:

A. Note \$15,000.00 dated September 17, 1903, signed, "The United Breweries Company by I. Baugart, Chairman of the Board of Directors, countersigned, H. C. Bannard, President," payable September 17, 1911, to own order. Endorsed as fol-

lows in blank, "United Breweries Company, I. 2935 Baumgart, Chairman of the Board of Directors, countersigned H. C. Bannard, President." Interest 6% per annum.

On the face of the said note appear various stampings in red ink relative to the payment of interest, the last of which is "interest paid September 17, 1907, the New York Trust Company, H. W. Morse, Assistant Secretary."

B. Similar note, same date, signatures and endorsement in blank, \$10,000.00 to own order, payable September 17, 1912, interest 6% per annum. Same stamping as to payment of interest.

C. Similar note, same date, signatures and endorsement in blank, \$5,000.00 to own order, due September 17, 1913, 6% interest. Same stamping as to payment of interest. 2936

D. Note, United Breweries Company, dated September 17, 1903, signed "The United Breweries Company by I. Baumgart, Chairman of the Board of Directors," countersigned "W. O. Tegtmeier, Vice-President," "\$20,000.00, payable September 17, 1914, to own order, interest 6%, endorsed in blank, "United Breweries Company, I. Baumgart, Chairman of the Board of Directors, countersigned W. O. Tegtmeier, Vice-President." Stamp- 2937 ing on face with payments of interest, the last being, "Interest paid to September 17, 1907, New York Trust Company, H. W. Morse, Assistant Secretary."

ITEMS V. AND VI.

ITEM V. Certificate No. 9168, THE UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, ENGLAND, LIMITED, 1,000 shares of £10 each, reading in the body thereof as follows:

"This is to certify that Messrs. Kessler & Company of 54 Wall Street, New York, Bankers, is the

- 2938 registered holder of 1,000 shares of £10 each, numbered 293, 131 to 294, 130, inclusive, in the above named Company subjected to the memorandum and articles thereof and that the sum of £2 has been paid upon each of the said shares, together with such further sums as are mentioned on the back hereof. Given under the name and seal of the said Company the 18th day of August, 1902." Upon the back thereof appear certificates of the payment of £8. Attached thereto is an irrevocable power of attorney Brewers' Legal Blank No. 114 to the effect that Kessler & Company have sold and transferred to.....the said 1,000 shares. Dated February 14, 1907, signed 'Kessler & Company,' presence of W. E. Magie."
- 2139

- ITEM VI. Trust Certificate No. B-311, 2,000 shares per value £1 each, Underground Electric Railways Company of London, Limited, issued by the Central Trust Company of New York as Trustee; certifying that Kessler & Company is entitled to 2,000 shares of the par value of £1 Sterling each in a certain Trust Fund provided for in an agreement dated September 8, 1902, between the Metropolitan District Electric Traction Company, Limited, the Underground Electric Railway Company of London, Limited, and the said Central Trust Company of New York, said certificate being dated New York, January 2, 1903, signed by the Central Trust Company, endorsed in blank under the printed power on the back, "Kessler & Company, February 6, 1903, in the presence of William E. Magie." Attached thereto are two notices of call, numbered 395 and 595, by the Underground Electric Railways Company of London, Limited, call No. 395, being dated January 22nd, 1907, calling £25 on the 1,000 shares of the said Company held by Kessler & Company, and a receipt for said £2500 dated the 14th day of February, 1907, signed
- 2940

by Speyer & Company for the Underground Elec- 2941
tric Railways Company; call No. 495, dated July
20, 1906, for £2500 with similar certificate of two
payments of £1250 each.

(These two notices of call should be attached to
the certificate for 1,000 shares (Certificate 0168)
as the calls correspond to the notations of pay-
ment on the back of said Certificate.)

ITEMS VII & VIII.

ITEM VII. STANDARD ROLLER BEARING COM-
PANY, Common stock:

Certificate 196, for 20 shares Common, dated 2942
February 1, 1904, in the name of Horace W. Ful-
ler, to which is attached (on Brewers' blank ir-
revocable power No. 114) an assignment and power
to transfer the same, with the name of the trans-
feree blank, signed "Horace W. Fuller," and
"Signed, sealed and delivered in the presence of
H. Bacon, dated March 10, 1904."

Certificate No. 145, 50 shares Common, dated
July 20, 1903, in name of Horace W. Fuller, to
which is attached similar irrevocable power, as-
signment and transfer, name of transferee blank,
signed by Horace W. Fuller and sealed, dated the 2943
10th day of March, 1904, "signed, sealed and de-
livered in the presence of H. Bacon."

ITEM VIII. Certificate No. A-116,—100 shares
Standard Roller Bearing Company, Preferred
Stock, dated June 30, 1903, in name of Horace W.
Fuller, to which is attached similar irrevocable
power, assignment and transfer, signed by Horace
W. Fuller, sealed, dated the 16th day of September,
1903, "Signed, sealed and delivered in the presence
of H. Bacon."

2944

ITEM IX.

ELKTON MINING COMPANY:

10 Certificates numbered from 30595 to 30604, inclusive, each for 1000 shares of the Elkton Consolidated Mining and Milling Company, in the name of Kessler & Company, dated October 29, 1907, each endorsed in blank under printed power of assignment in usual form, "Kessler & Company," dated October 29, 1907, "Witness, H. Bacon."

ITEM X.

UNITED STATES REDUCTION AND REFINING COMPANY. Common Stock:

2945 Certificates numbered as follows, each for 100 shares:

B-34, dated 10th day of July, 1901, name of Rudolf E. F. Flinsch, endorsed in blank under usual form of Stock Transfer on back "R. E. F. Flinsch," and also "Kessler & Company," "In presence of William E. Magie," Endorsement dated September 5, 1901.

B-35, same date, name and endorsement and same date of endorsement.

B-74, dated July 10th, 1901, name of W. K. Gillett, endorsed in blank, dated March 19, 1902, "W. K. Gillett," "Kessler & Company," "In presence of
2946 H. Bacon."

B-1310,—dated April 27, 1905, in name of Lounsbury & Company, endorsed in blank, under date of April 28, 1905, under usual printed form, "Lounsbury & Company, in presence of William H. Ten Broeck."

B-1309,—dated April 27, 1905, in name of Lounsbury & Company, endorsed April 28, 1905, "Lounsbury & Company, in presence of William H. Ten Broeck, endorsed in blank under usual printer form.

B-1308,—April 27, 1905, name of Lounsbury & Company, endorsed April 28, 1905, "Lounsbury &

Company, in presence of William H. Ten Broeck," 2947
endorsed in blank under usual printed form.

B-1307,—same date, name, endorsement in blank
and same date of endorsement as 1308.

B-1306,—Same date, name, endorsement in blank
and same date of endorsement as 1307

B-96. July 10, 1901, name of Alfred Kessler,
endorsed in blank, under usual printed form, dated
July 25, 1901, "Alfred Kessler," "In presence of
W. E. Magie."

B-97,—July 10, 1901, name of Alfred Kessler,
endorsed in blank under usual printed form, dated
July 25, 1901, "Alfred Kessler," and Also "Kessler
& Company," "In presence of W. E. Magie." 2948

ITEM XI.

UNITED STATES REDUCTION AND REFINING COM-
PANY, Preferred Stock:

Five Certificates numbered 1324 to 1328, inclu-
sive, each for 100 shares, each dated the 19th day
of September, 1905, each in the name of Albert
Katt, each endorsed in blank under usual printed
form of stock transfer as follows: "Albert Katt",
"Kessler & Company," "In presence of P. A.
Brueck." Endorsement dated on each certificate,
September 20 1905.

2949

ITEM XII.

BONDS OF THE PITTSBURG, WESTMORELAND & SOM-
ERSET RAILROAD COMPANY."

First Mortgage 5%, 30 year Gold Bonds, due Oc-
tober, 1935, interest due April and October 1st.
Trustee, New York Trust Company, par value
\$1000.00 each. Coupons attached from April 1908
on, to wit:—from Coupon No. 5 to No. 60, inclusive.
Each bond a Bearer Bond, viz: "To the New York
Trust Company of New York or bearer," and no
one of said Bonds being registered. Numbers of

2950 said Bonds being as follows: Nos. 201 to 228, inclusive. Nos. 417 to 433, inclusive.

(Note,—Under the elastic band holding said bonds together appears a slip of paper containing the following: "45,000 Pitts. West & Somerset K. & Co., Escrow.")

ITEM XIII.

THE FOLLOWING BONDS OF THE INDIANA, COLUMBUS & EASTERN TRACTION COMPANY.

Par value, \$1000.00 General & Refunding Mortgage, 5% 20 year Gold Bonds, principal due 1926, interest payable May 1st and November 1st in Philadelphia. Each Bond payable to bearer or registered holder, none of said Bonds being registered. Attached to each Bond are coupons numbered 4 to 40, inclusive, number 4 being due May 1908, \$25. Name of Trustee The Pennsylvania Company for Insurance on Lives and Granting Annuities. Bonds numbered 1618 to 1629 inclusive.

2051

ITEMS XIV & XV.

MUSKOGEE GAS AND ELECTRIC COMPANY, Oklahoma Corporation.

ITEM XIV. Common Stock, Certificate No. 19, 100 shares dated February 13, 1907, name of Kessler & Company, endorsed in blank under printed power of assignment, and transfer February 20, 1907, "Kessler & Company," "In presence of W. E. Magie."

2952

Certificate No. 20,—100 shares ditto, Common, dated February 13, 1907, name of Kessler & Company, endorsed February 20, 1907, endorsed in blank under regular printed form, "Kessler & Company," "In presence of W. E. Magie."

Certificate No. 21,—88 shares ditto, common, dated February 13, 1907, name of "Kessler & Company", endorsed in blank under date of February

20, 1907, "Kessler & Company," "in presence of W. E. Magie." 2953

ITEM XV. Preferred Stock. Certificate No. 24,—100 shares preferred, dated February 13, 1907, name of Kessler & Company, endorsed in blank under printed form of transfer under date of February 20, 1907, "Kessler & Company, in presence of W. E. Magie."

Certificate No. 25,—ditto preferred, 100 shares dated February 13, 1907, name of Kessler & Company, endorsed in blank under printed form of transfer under date of February 20, 1907, "Kessler & Company, in presence of W. E. Magie."

Certificate No. 26,—88 shares ditto preferred 2954
February 13, 1907, name of Kessler & Company, endorsed in blank under printed form of transfer February 20, 1907, "Kessler & Company, presence of W. E. Magie."

ITEM XVI.

MUSKOGEE GAS AND ELECTRIC COMPANY BONDS.

(Note,—These Bonds were found in a roll covered by a brown paper on which appeared the following: "Kessler & Company, Escrow Muskogee Gas and Electric Company bonds, 5%, June and December," and the figures "22" underneath this 2955
"42" and underneath this "43" with lines drawn through the figures "42" and "43".)

These Bonds are the Muskogee Gas & Electric Company, \$1000.00 each, First and Refunding mortgage 5% Gold Bond, principal due December 1, 1926, interest payable June 1, and December 1, at the American Trust & Savings Bank, Chicago, Illinois. Trustee, American Trust & Savings Bank of Chicago, Illinois, each Bond is a bearer Bond or may be registered. None of the Bonds are registered. Said Bonds are numbered 149 to 170 inclusive, and attached to each bond are coupons num-

2956 bered 2 to 40, inclusive, coupon No. 2 being due December 1st, 1907.

ITEM XVII.

DOCUMENTS IN RELATION TO BEDFORD AVENUE PROPERTY.

2957 A. Bond and Mortgage, Catherine I. Mackay and husband to the Title Guarantee and Trust Company, principal sum \$10,000.00 payable June 16, 1893, interest at 5%, dated June 16, 1892, and acknowledged on that date. Mortgage accompanying same by same parties for \$10,000.00 same dates and acknowledgment covering property situate, lying and being in the City of Brooklyn, County of Kings and State of New York, bounded and described as follows: to wit:

2958 BEGINNING at a point on the Westerly side of Bedford Avenue, distant Two Hundred and Thirty-seven feet Southerly from the corner formed by the intersection of the Westerly side of Bedford Avenue with the Southerly side of De Kalb Avenue; running thence Westerly One hundred feet to a point distant Two hundred and Thirty-seven feet, eight inches Southerly from the Southerly side of De Kalb Avenue when measured on a line drawn parallel with Bedford Avenue; thence Southerly parallel with Bedford Avenue Twenty-four feet, Three inches; thence Easterly parallel with De Kalb Avenue and part of the distance through a party wall One hundred feet to the Westerly side of Bedford Avenue and thence Northerly along the Westerly side of Bedford Avenue Twenty-four feet, Eleven inches to the point or place of beginning. Being a portion of the same premises which are conveyed to the said Catherine I. Mackey by Edward Freel and wife, by deed bearing even date herewith and intended to be recorded simultaneously with this Indenture; this mortgage being a purchase money mortgage and

given to secure a portion of the consideration in 2959 said deed expressed. The said Mortgage is recorded in the Registrar's Office, Kings County, Liber 211 Mortgages, page 231, June 18, 1892.

B. Assignment of said Mortgage and Bond, Title, No. 37196 by Title Guarantee and Trust Company to William G. Vermilye as Trustee under the last Will and Testament of Charles C. Lathrop, said Assignment being duly recorded in the Registrar's Office, Kings County, Liber 2417, Mortgages, page 423, July 13, 1892.

C. Extension of mortgage, dated December 11, 2960 1897, between William G. Vermilye as Trustee, etc., and Edward J. Halligan, extending said Mortgage to November 16, 1900.

D. Assignment of said Mortgage by William G. Vermilye as trustee under the last will and Testament of Charles C. Lathrop to Emma G. Lathrop, assigning a Mortgage dated June 10, 1892, made by Catherine I. Mackay and John, her husband, to the Title Guarantee and Trust Company, and recorded June 18, 1892, County of Kings, Liber 2411, Mortgages, page 431, and thereafter assigned to the party of the first part by assignment dated 2961 July 9, 1892, recorded Kings County, July 13, 1892, Liber 2417, Mortgages, page 423. Said Assignment was executed on the 8th day of May, 1899, and acknowledged on the 15th day of May, 1899, and is stamped, recorded Registrar's Office, Kings County, Liber 20, page 401, Mortgages, Section 7, Block 1942, May 15, 1899.

E. Deed, dated October 31, 1907, between Henry Kessler of Manchester, England, and Gertrude Sophia Kessler, his wife, and Kessler & Company, Limited, of Manchester, England, conveying pre-

2962 mises Nos. 1018, 1020 and 1022 Bedford Avenue, Brooklyn, bounded and described as follows:

BEGINNING at a point on the Westerly side of Bedford Avenue, distant Two hundred and Thirty-seven feet Southerly from the corner formed by the intersection of the Westerly side of Bedford Avenue with the Southerly side of De Kalb Avenue, running thence Westerly One hundred feet to a point distant Two hundred, Thirty-seven feet, Eight inches, Southerly from the Southerly side of De Kalb Avenue measured on a line drawn parallel with Bedford Avenue, thence Southerly parallel with Bedford Avenue Seventy-two feet, Nine inches, 2963 thence Easterly parallel with De Kalb Avenue and part of the distance through a party wall one hundred feet to the Westerly side of Bedford Avenue, and thence Northerly along the Westerly side of Bedford Avenue seventy-three feet, Five inches to the point or place of beginning; said Deed being a sale covering against Grantor Deed, signed by the parties grantor, 31st of October, 1907, and acknowledged on said date before Frederick C. McLaughlin, Notary Public.

F. Following receipt "New York, October 31, 1907, Received this day from Mr. Henry Kessler the following documents to have same recorded in office 2964 of Registrar of Kings County, and returned to him. First: Assignment of Mortgage dated February 19, 1903, from Emma G. Lathrop to Henry Kessler, covering premises No. 1020 Bedford Avenue, Brooklyn, amount \$10,150.00. Second, deed from William K. Gillett to Henry Kessler covering Nos. 1018 and 1020 Bedford Avenue, Brooklyn, dated November 13, 1905." Signed, McLaughlin, Russell, Coe & Sprague.

ITEM XVIII.

A RECEIPT For Subscription payments No. 57, WESTERN PACIFIC RAILWAY COMPANY, First

Mortgage 5% 30 year Gold Bonds. Syndicate sub- 2965
 scription, \$40,000.00 in face value of Bonds, recit-
 ing, Blair & Company, William Salomon & Com-
 pany and William A. Reed & Company, Managers
 of the above named Syndicate, hereby acknowledge
 the receipt by them as such Managers of the sum of
 Seven thousand, Two hundred, Thirty four and
 28/100 (\$7,234.28) Dollars on account of obligation
 of Kessler & Company as a subscriber to said
 Syndicate, the same being the amount of the first
 instalment payable by said subscriber under the
 agreement of April 26, 1905. This receipt is issued
 subject to all the terms and conditions of the
 Syndicate agreement and the holder of this receipt 2966
 by the acceptance hereof assents to and agrees to be
 bound by all the provisions of said agreement.
 Dated July 6, 1905, signed Blair & Company, for
 the Managers. Stamped on the back; Interest paid
 to September 1st, 1905.

Ditto, March 1st, 1906.

Ditto, September 1st, 1906.

Ditto, September 1st, 1907.

Ditto, March 1st, 1907.

Attached thereto is an irrevocable power No. 114,
 Brewers Blank, a transferee of the same in blank,
 the said assignment in blank signed "Kessler & Com- 2967
 pany," sealed and dated 8th of July, 1907. "Signed,
 sealed and delivered in the presence of W. E.
 Magie."

ITEM XIX.

CHICAGO, GREAT WESTERN RAILWAY COMPANY.
 The following certificates:

A—2435,—100 shares of \$100.00 each, of the 4%
 Preferred Stock B of the said Company, dated June
 14, 1906, name of Kessler & Company, endorsed in
 blank under usual printed form of transfer on

2968 back, "June 21, 1906, Kessler & Company, in presence of W. E. Magie."

A—2436,—100 shares ditto, date and name same as A—2435, endorsed in blank under same date, in same manner "Kessler & Company."

A—2437,—100 shares ditto, same date, name and same endorsement in blank same date and manner as No. 2436.

A—2438,—100 shares ditto, same date, name and same endorsement in blank, under date of June 21, 1906, by Kessler & Company.

A—2439,—100 shares ditto, same date, name and same endorsement of Kessler & Company in blank, 2969 June 21, 1906.

No. 921, dated June 14, 1906, for 48 shares of \$100.00 each in the 4% Preferred Stock B of same Company, name of Kessler & Company, endorsed under usual form of transfer in blank, "Kessler & Company, June 21, 1906, in presence of William E. Magie."

ITEM XX.

Roll of Bonds, ORLEANS COUNTY QUARRY.

(Note.—Held together by elastic band, under which is inserted slip of paper as follows: "\$20,000 Orleans County, Kessler & Company, Escrow.")

Said bonds Orleans County Quarry being First 2970 Mortgage Coupons, 6% Gold Bonds, Bearer Bonds, with provisions for Registry. Par value \$1000.00, principal due April 1st, 1926, interest payable April 1st and October 1st, Trustee, Trust Company of America.

Said Bonds are numbered 26 to 45, inclusive, none of them are registered and each contains the coupons numbered 4 to 40, inclusive, for \$30.00 each; number 4 being payable April 1908.

DISTRICT COURT OF THE UNITED STATES, 2971

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. F.
FLINSCH and WILLIAM K.
GILLETT, composing the firm
of Kessler & Company,
Bankrupts.

LAWRENCE E. SEXTON, as
Receiver in Bankruptcy, of
Alfred Kessler, Rudolf E. F.
Flinsch and William K. Gil-
lett, composing the firm of
Kessler & Company, and the
said Kessler & Company

AGAINST

KESSLER & COMPANY, LIMITED.

2972

TO THE HONORABLE, THE JUDGES OF THE DISTRICT 2973
COURT OF THE UNITED STATES IN AND FOR THE
SOUTHERN DISTRICT OF NEW YORK:

I, PETER B. OLNEY, appointed by the District
Court "Master in Chancery to take the testimony
in this cause and report the same to this Court with
his opinion," do hereby respectfully report as fol-
lows:

On the motion of Kessler & Company, Limited, of
Manchester, England, and Frank Youatt, Esq., the
provisional liquidator of Kessler & Company, Lim-
ited, an order was made in the bankruptcy proceed-

- 2974 ings on the 26th day of November, 1907, by Hon. Charles M. Hough, District Judge, that the "claim of the Receiver in Bankruptcy herein and of the estate of the bankrupts above named to the securities and property in the possession of Kessler & Company, Limited, of Manchester, England, which claim is set forth in the affidavit of John Larkin, Esquire, verified the 7th day of November, 1907, upon which the order appointing the Receiver herein was made, and any and all other claims of the said bankrupt estate to the said property, be and the same hereby are referred to Honorable Peter B. Olney, Referee in Bankruptcy, as United States Special Commissioner, to hear and determine the same upon the merits."
- 2975

Pursuant to said order, the respective parties appeared before the undersigned, and began to take evidence. Thereafter, by consent, in order to present the issues, Lawrence E. Sexton as Receiver in Bankruptcy of Kessler & Company filed his petition duly verified on the 10th day of December, 1907, wherein he prayed that the securities and property in question transferred by the bankrupts be held to be the property of the bankrupt estate, and that the same be delivered to him as Receiver or to the Trustee of the said estate when he had been elected, and to this petition Kessler & Company, Limited, and Frank Youatt, Esq., its liquidator, appearing by their attorneys, filed their answer duly verified on said 10th day of December, 1907, denying the material allegations in the petition contained.

2976

A vast amount of testimony and evidence was taken in the matter, which, contained in two volumes, is herewith filed.

On the 30th day of December, 1907, Lawrence E. Sexton, the Receiver, was duly elected Trustee of the bankrupts, and duly qualified as such Trustee

on the 7th of January, 1908, and is now in the dis- 2977
charge of his duties as such.

On the 23rd day of March, 1908, an order was entered herein by the Hon. George C. Holt, District Judge, upon the motion of John Larkin, Esq., attorney for Lawrence E. Sexton, Trustee, and upon the consent of the attorneys of Kessler & Company, Limited, and Frank Youatt, Esq., its liquidator, which order recited that Kessler & Company, Limited, and its liquidator on or about the 23rd day of November, 1907, had waived its right to a plenary suit and submitted to the jurisdiction of this Court, and recited the other proceedings hereinbefore set forth, and ordered, "that this action be deemed an 2978
action in equity brought by Lawrence E. Sexton, as Trustee in Bankruptcy of Kessler & Company, bankrupts, both as individuals and as copartners of the firm of Kessler & Company, against Kessler & Company, Limited, and that the pleadings interposed herein by the parties be deemed the pleadings in said action, and that the said action be deemed in all respects an action in equity by the Trustee in Bankruptcy brought in the United States District Court for the Southern District of New York in pursuance of the provisions of the bankruptcy statutes, and be governed by all the rules of procedure and of law with reference thereto." And 2979
said order further provided, "that the order of reference to Peter B. Olney, Esq., dated November 26th, 1907, be and the same hereby is amended by striking out the words 'Special Master to hear and determine the same upon the merits' and inserting in lieu thereof the following, 'Master in Chancery to take the testimony in this cause and to report the same to this Court with his opinion'; and the amendment hereby ordered to be made in said last mentioned order shall be deemed to have been made as of November 26, 1907." A copy of said order is herewith returned.

- 2980 On the 30th day of March, 1908, an order was made herein by Hon. George C. Holt, District Judge, upon the petition of J. & P. Coats, Limited, a corporation, for leave to intervene herein. After the filing of said petition and the affidavit of William M. Coleman in support thereof, and due proof of service of copy of said affidavit and petition and notice of application upon the attorneys for Kessler & Company, Limited, and Frank Youatt, its liquidator, and upon the attorney for the petitioning creditors herein, and after hearing counsel in support of the application and counsel for the Trustee in opposition, on motion of William D.
- 2981 Guthrie, Esq., attorney for said J. & P. Coats, Limited, the Court ordered that "J. & P. Coats, Limited, be and it hereby is granted leave to intervene herein and to file the intervening petition annexed to the moving papers herein setting forth its claim; that the allegations therein be taken to be denied by the Trustee, without the filing of any formal reply to any new matters alleged therein, and that the issues raised by such answer be and the same hereby are referred to Peter B. Olney, Esq., the Special Master heretofore appointed, to take proof and report with his opinion. And it is further ordered, that all the testimony and exhibits heretofore taken before the Special Commissioner stand,
- 2982 and that the intervention of these petitioners be subject thereto, and that further hearings before said Referee on said intervention, if any, proceed so far as practicable from day to day in order that the proceedings before said Referee be determined without any unnecessary delay. And it is further ordered, that in the event of the intervenor succeeding on this application, the costs be paid out of the bankrupt estate. And it is further ordered, that this order be amended *nunc pro tunc* as of March 3rd, 1908, the day said application to intervene was heard by the Court."

Thereafter, such evidence as was offered by J. & P. Coats, Limited, the intervening petitioner, was taken, and will be found in volume 2nd of the evidence herewith filed. The claim of J. & P. Coats, Limited, is in substance that they are entitled to be subrogated to whatever rights Kessler & Company, Limited, have in the securities called the escrow of August, 1907. 2983

Upon the hearings before me, Lawrence E. Sexton, the Receiver and Trustee, has been represented by John Larkin, his attorney and counsel; Kessler & Company, Limited, and Frank Youatt, its liquidator, by Messrs. McLaughlin, Russell, Coe & Sprague, their attorneys, and by Abram I. Elkus, Esq., of counsel; J. & P. Coats, Limited, by William F. Coleman, Esq., and by Henry D. Hotchkiss, Esq., of counsel, and Origen S. Seymour, Esq., attorney for the bankrupts Kessler and Flinsch, attended on some of the hearings; and I have been greatly aided in the consideration of the proofs and questions of law involved by the able and voluminous briefs filed by the respective counsel. 2984

After careful examination of the evidence taken, I report the following Findings of Fact:

FIRST.—That prior to its bankruptcy Kessler & Company of New York was a partnership organized on the 1st day of January, 1902, and composed of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, and carried on business as bankers and brokers, its principal office being at 54 Wall Street, in the City of New York. The firm of Kessler & Company and its predecessors had been in business in the City of New York for many years. The firm was engaged in the business of foreign bankers, having correspondents in various parts of Europe. It bought and sold foreign exchange in large amounts; it made loans, it bought and sold stocks and bonds on the Stock Exchange, the firm having a membership there; it advanced moneys to 2985

2986 several dry goods importing houses; it opened letters of credit for importation of goods; issued travelers' letters of credit; it promoted industrial and railroad enterprises, and it participated in various syndicates organized to promote such enterprises. Its dealings in foreign exchange were very large, involving the "turn-over" in the course of a year of many millions.

2987 SECOND.—Kessler & Company, Limited, of Manchester, England, was and is a corporation organized in 1902, under the English Companies Acts, with its principal office in the City of Manchester, England, and a branch office in New York. Its principal business is dealing in dry goods; it has agents in various parts of the world, and sends out travelers everywhere. In addition to its dry goods business, it did some business in accepting drafts, making payments against a few letters of credit, and accepting a few deposits. It did not discount notes. Its directors are: Philip W. Kessler, George A. Averdieck, George A. Kessler and Henry Kessler. Henry Kessler is Chairman of the Company and chief managing officer. Philip W. Kessler and George A. Kessler are sons of William Kessler, deceased, and brothers of Alfred Kessler, one of the bankrupts. Henry Kessler is a second cousin of Alfred Kessler. Said William Kessler during his life was a member of the firm of Kessler & Company of New York as well as of the firm of Kessler & Company of Manchester, which prior to his death was a copartnership. William Kessler died in January, 1901. Thereafter the corporation was organized in 1902. The authorized capital stock of the Manchester corporation is 250,000 pounds, equally divided between ordinary and preference shares. 108,501 pounds of ordinary shares have been issued, all of which are owned among the executors of William Kessler, deceased, and branches of the Kessler

2988

family and their connections or relations, except 2989 ordinary shares to the amount of 10,000 pounds, which are owned by George A. Averdieck. 112,000 pounds of preference shares have been issued, of which 54,300 pounds are owned by various members of the two branches of the Kessler family, some of whom are no relation to Alfred Kessler, and 57,700 pounds are owned by others than the Kessler family. Alfred Kessler owns three thousand pounds of ordinary and three thousand pounds of preference shares.

William Kessler's interest prior to his death in the firm of Kessler & Company, of New York, the predecessor of the present bankrupt firm, was 2990 thirty per cent. of profit and losses. On the death of William Kessler, his interest in Kessler & Company of New York was liquidated, and his share of the capital and profits paid to his executors, except the sum of about \$95,000, which was left in the firm as a loan, upon which his executors have received interest at five per cent. In addition to this \$95,000, a further sum of about \$78,000 was loaned by the executors of William Kessler to Alfred Kessler personally, and part of this sum was loaned by Alfred Kessler to Flinsch. This \$78,000 was used by Alfred Kessler and Flinsch to make up their proportionate contribution to the 2991 new partnership of Kessler & Company of New York, the present partnership, which began the 1st day of January, 1902, and consisted of the bankrupts. This partnership was organized with a capital of \$1,000,000, of which Flinsch contributed \$400,000, Alfred Kessler, \$300,000, and William K. Gillett, \$300,000.

THIRD.—The principal business relation between Kessler & Company, of New York, and Kessler & Company, Limited, of Manchester, was a constant drawing credit afforded by the Manchester corpo-

2992 ration to the New York partnership. Prior to June 30th, 1903, this constant credit seems to have been extended without security having been given or required.

FOURTH.—On or about June 30th, 1903, Kessler & Company, of New York, sent the following letter to Kessler & Company, Limited, Manchester, which was received by said company:

"KESSLER & Co., Bankers,
No. 54 Wall Street,
New York.

JUNE 30, 1903.

2993 Per S. S. "Oceanic."
Messrs. KESSLER & Co., Limited,
Manchester.

DEAR SIRS:—

In accordance with instructions from Mr. Alfred Kessler, we have today placed in a separate package in our safe deposit vaults the following securities, package marked "Escrow for account of Kessler & Co., Limited, Manchester":

2994	1484 shares Oklahoma Gas & Electric Co., at 25	\$37,100.
	2428 shares United Lighting & Heating Co., at 12	29,136.
	2352 shares Daimler Manufacturing Company, at 50	117,600.
	\$373,000. United Breweries Co. first 6's, at 65	242,245.
		<hr/> \$406,081.

This escrow is intended as a protection against our long drawings against your good selves.

Kindly confirm if in order, and oblige.

Yours very truly,

KESSLER & Co."

On the 8th day of July, 1903, the following letter ²⁹⁹⁵ from Kessler & Company, Manchester, to Kessler & Company, of New York, was written, sent and received in due course of mail:

"8th July 3.

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

We are in receipt of your favour of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up to us and the matter ²⁹⁹⁶ goes in order.

If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality.

* * *

We are, dear Sirs,

Yours very truly,
P. W. KESSLER."

The following letter dated the 23rd of December, 1903, was sent by the Manchester Company to ²⁹⁹⁷ Messrs. Kessler & Company, New York, and received by said firm:

"Private

23rd Dec. 3.

Messrs. KESSLER & Co.,
New York.

DEAR SIRs,

For the purposes of the audit of our books for our yearly balance sheet, we should feel obliged if you would send us, in the form of a certificate, the particulars of the securities

2998

you have set aside against your drawing credit with us. We should like this done annually on the 31st December.

We do not think the matter will present any difficulty for you. Something in the form of the enclosed is what we require.

Thanking you in advance,

We are, dear Sirs,

Yrs truly,

P. W. KESSLER.

2999

We certify that we have specially set aside and hold for your acct. on this, the 31st day of December, .03, as security for the drawing credit which you accord us, the following securities.

Name secs. and market value."

To this letter Kessler & Company, of New York, replied as follows:—

"KESSLER & Co.

Bankers.

54 Wall Street,

New York, 1 Jan., 1904.

Messrs. KESSLER & Co., Lim.,

Manchester.

3000

DEAR SIRs,

We certify that we have specially set aside and hold for your account on this, the 31st day of December, 1903, as security for the drawing credit which you accord us, the following securities:

1484 shares Oklahoma Gas & Elec-		
tric, at	25	\$37,100
2428 shares United Light and Heat-		
ing, at	10	24,280
2352 shares Daimler Mfg. Co, at 50		117,600
\$36,000 shares United Brewery New		
1st 6% bonds, at	100	36,000

"50,000 shares United Brewery New 3001
1st 6% notes at100 50,000

"134,800 Certificates of pay-
ments to Trust. Co. on
a. c. 1st Mortgage bonds
of Chicago & Gt. Western
R. R., at 89 119,972

1348 shares Com. Stock C. Gt. W.
15 20,220

\$405,172

You hold in addition to this
1606 shares United Lighting &
Heating10 16,060 3002

\$421,232

KESSLER & Co."

On or about the 20th of January, 1904, Kessler
& Company, Limited, sent the following letter to
Kessler & Company, New York:

"Private

20 Jany.

Messrs. KESSLER & Co.,

New York.

DEAR SIRs,

3003

We are in receipt of your favour of 1st
Jany, in which you give us particulars of
the securities you hold in escrow for us
against your drawing credit with us. The
same are noted.

Should you, in the course of the year,
through sale or otherwise, have occasion to
vary this deposit, we should feel obliged by
your advising us forthwith.

We are, dear Sirs,

Yours very truly,

P. W. KESSLER."

- 3004 FIFTH.—The securities mentioned in the letter of Kessler & Company, of New York, of the date of June 30th, 1903, were put in a separate package and put on a shelf in one of the safe deposit vaults of Kessler & Company. This package was endorsed, "Escrow of Kessler & Co., of Manchester," with list of the securities, with the valuation placed on them, following the endorsement. The changes in the securities, that is, the taking out of certain of the securities and substituting others in their place—was done in the safe deposit company. The package containing the securities was not removed from the safe deposit vault except on two occasions; once,
- 3005 when Mr. P. W. Kessler was in New York, when the securities were taken over to the office and he checked them off, and on a similar occasion when Frank Youatt was over here, and for his examination the securities were produced and checked off; on the 24th of October, 1907, the examination of the securities by Henry Kessler seems to have been made in the safe deposit vault.

- SIXTH.—Changes in these securities were frequent, and were made by Kessler & Company, of New York, without consulting Kessler & Company, of Manchester, beforehand, but the changes were reported after they had been made. In no case does
- 2006 it appear that Kessler & Company, of Manchester, objected to any of the changes made.

SEVENTH.—Kessler & Company, of New York, in a memorandum book, which was called the loan book, made certain entries relative to these transactions. The first entry is entitled, "Escrow Kessler & Co., Manchester," and appears to have been made under date of April 15th, 1904. Under this entry were entries of the securities then constituting the escrow and memoranda indicating changes which were made subsequent to that time down to

and including October 13th, 1904. At the date of ³⁰⁰⁷ October 14th, 1904, under the head "Kessler & Co., Manchester Escrow," the securities at that time constituting the escrow were entered on a subsequent page in the loan book, and changes made down to and including November 2nd, 1904, were noted. On January 4th, 1905, under the head "Escrow Kessler & Co. Manchester," the securities at that time constituting the escrow were entered on a subsequent page in the loan book, and the changes thereafter indicated down to and including July 3rd, 1905. On July 15th, 1905, similar entries were made, and thereafter from time to time, on subsequent pages of the loan book. The last entry of that ³⁰⁰⁸ character is on page 159 of the loan book, under date of October 22nd, 1907.

This entry is as follows:

"Escrow Kessler & Co. Ltd.			
Manchester.			
2428 sh. United Lighting &			
Heat	10	\$24,280.	
1606 sh. United Lighting &			
Heat in Manchester.....	10	16,060.	
1341 sh. Daimler Mfg Co.			
pf'd.	100	134,100.	
\$56,000 United Breweries 1st			
M. 6's.....	80	44,800.	3009
50,000 United Breweries			
Notes		50,000.	
1,000 sh. Underground El. }			
Ldn. full paid..... }			
200 sh. Underground Bene- }		49,663.13	
ficial Cert..... }			
70 sh. Standard Roller Bear-			
ing \$50. share.....	60	4,200.	
100 sh. Standard Roller pf'd..	50	5,000.	
10,000 sh. Elkton Mining Co.	50	5,000.	
500 Sh. U. S. Red. & Ref. Co.			
Pfd.	25	12,500.	

3010	1,000 U. S. Red. & Ref. Co. com.	10	10,000.
	\$45,000. Pittsbg., Westmore- land & Som. 1st 5's.	95	42,750.
	12,000—Ind. Col. & East Tract 1st.	90	10,800.
	288 Sh. Muskogee, Gas & Elect. Com.	20	5,760.
	288 Sh. Muskogee, pfd.	60	17,280.
	\$22,000 Muskogee, pfd. Refdg.	87	19,140.
	Bedford Avenue property...		31,000.
	Western Pacific Syn. rect...		7,234.28
3011	548 sh. Chicago Gt. Westn. Pfdg. B.	10	5,480.
	\$20,000 Orleans County Quarry Co. 1st.	90	18,000.
<hr/>			
\$513,047.41			

The entries in red ink on that page, which entries include everything except the value of the shares, which values are in black ink, and the footing, which is in pencil, are in the handwriting of Albert Kessler, then a confidential clerk in the employ of Kessler & Company of New York. The valuations of the securities, which are in black ink, are in the handwriting of the bankrupt Alfred Kessler, as is also the footing in pencil, to wit, \$513,047.41.

EIGHTH.—Under date of New York, 27th of August, 1907, the following letter was written by Kessler & Company of New York to Kessler & Company, Manchester, and received by the latter Company:

"Kessler & Co., 54 Wall Street,
Bankers. NEW YORK, 27 Aug. 1907
MESSRS. KESSLER & Co. Lim.
Manchester.

Dear Sirs,

A few days ago we sold at 90 1/2 and Int.
\$20,000 Muskogee Gas & El. Bonds and with-

drew them from your escrow replacing them 3013
by \$20,000 Orleans County Quarry bonds 1st
6%’s at 90.

“We cabled you to-day we had drawn
£20,000 60 d.s on your good selves and gave
placed in a separate escrow against this the
following:

\$25,000 Orleans Co. Quarry 1st 6s at 90.....	\$22,500	
Note \$10,000 Orleans Co Quarry se- cured by bonds at 75 Nov. 7.....	10,000	
Note \$10,000 Orleans Co Quarry se- cured by bonds at 75 Nov. 7....	10,000	
Note \$4,775 Orleans Co Quarry se- cured by bonds at 75 Nov. 18....	4,775	3014
Note \$8,000 R. B. Maclea Co. Due Dec. 5.....	8,000	
Note \$7,000 R. B. Maclea Co. Due Dec. 5.....	7,000	
Note \$5,000 R. B. Maclea Co. Due Dec. 5.....	5,000	
Note \$16,000 Milne Turnbull & Co. Nov. 11	16,000	
Note \$17,000 “ Dec. 27	17,000	
Note \$7,000 “ “	7,000	
	<hr/>	
	107,275	3015

Yours truly,
KESSLER & Co.”

In answer to that letter, Kessler & Company of
Manchester under date of the 4th of September,
1907, wrote as follows:

“Private

4th Sept. 7.

Messrs. KESSLER & Co.

New York.

DEAR SIRs:

We note from your favour of the 27th ulto.
the change you have made in our escrow,

3016

We also take note of the securities which you have lodged in a new separate escrow against your special drawing of £20,000 about which you cabled us and which you advise in your ordinary correspondence received today.

We anticipate that this special drawing will not be renewed and that your drafts on us generally will presently come to a more moderate level.

Yours very truly,

P. W. KESSLER."

3017

This escrow was called the "Special Escrow" and the securities were put in a separate package and placed on a shelf in the vault of Kessler & Company of New York and endorsed: "Special Escrow, Kessler & Co. of Manchester." Nothing appears to have been said by Kessler & Company of Manchester about Kessler & Company of New York having permission or authority to withdraw any of these securities in the special escrow and substitute other securities therefor. Kessler & Company of New York, however, did withdraw certain of these securities and substituted others in their place. On the 20th of September, 1907, Kessler & Company

3018

of New York withdrew two Orleans County Quarry notes, each for \$10,000, and bonds as collateral, and put in place thereof 200 shares of common Cripple Creek Central Railroad stock and 200 shares of preferred Cripple Creek Central Railroad stock. On the 27th of September, 1907, they withdrew from the special escrow \$8,000 note of R. B. Maclea Company and \$7,000 note of R. B. Maclea Company, and put in their place 166 shares of preferred Cripple Creek Central Railroad stock and 100 shares of common Cripple Creek Central Railroad stock. On the 10th of October, 1907, Kessler & Company of New York withdrew the Orleans

County Quarry note of \$4,775 and the bonds at- 3019
tached, and substituted in place thereof 100 shares
of preferred Cripple Creek Central Railroad stock.

With respect to this special escrow an entry was
made on page 154 of the loan book as follows: "Spe-
cial Escrow, Kessler & Co., August 27 (1907),
£20,000, 60 d.s."; then follows a description of the
securities originally constituting the special escrow
and the changes, as above indicated, made from time
to time down to and including October 10th, 1907.

NINTH.—On October 4th, 1907, Henry Kessler,
who was the Chairman and chief managing officer
of Kessler & Company, Limited, arrived in New 3020
York. On the following day Henry Kessler called
at the office of Kessler & Company in Wall Street
and there met Mr. McLean, Mr. Albert Kessler and
Mr. Nestle, employees of Kessler & Company. On
the 7th of October, 1907, he was at the office of Kessler
& Company and saw Alfred Kessler, Albert
Kessler, Nestle and McLean. He went to Philadel-
phia on the 8th and stayed there until the 14th,
thence he went to Atlantic City, and returned to
New York on the 21st of October. Certain communi-
cations received from the Manchester Company were
forwarded by Kessler & Company of New York to
Mr. Henry Kessler, and received by him, during his 3021
absence from the city. On the 21st of October Alfred
Kessler and his wife dined with Henry Kessler at
the latter's hotel.

On Tuesday, October 22nd, 1907, Henry Kessler
visited the office of Kessler & Company in Wall
Street. On that day the Knickerbocker Trust Com-
pany closed its doors, and the acute financial panic
began and continued during the rest of that week
and the following week and for some time there-
after. Henry Kessler remained in New York dur-
ing the week ending Saturday, the 26th of October,
with the exception of a visit to Philadelphia on the

3022 23rd. On the 24th and 25th of October he visited the office of Kessler & Company. On the 23rd of October the run was begun upon the Trust Company of America, whose office is at No. 37 Wall Street, which run persisted for many days, and for several days Wall Street was crowded with depositors seeking to draw their deposits. There was great excitement in the Stock Exchange. Rates for money were quoted at 115, and unlisted securities and securities other than first class securities could not be sold at any price.

On the 24th of October, 1907, Henry Kessler, together with Albert Kessler, examined the securities
 3023 in the "escrow" and special "escrow," and checked off same. On the afternoon of the 24th of October Henry Kessler called at the office of Messrs. McLaughlin, Russell, Coe & Sprague, and there had a conversation with Mr. McLaughlin. In the course of conversation about other matters, the matter of the "escrow" was mentioned, and Mr. McLaughlin advised Henry Kessler to take possession of the "escrow" securities in the name of Kessler & Company, Limited, of Manchester, and to place them in a separate safe deposit box. At that interview Mr. Henry Kessler stated to Mr. McLaughlin, in reply to a question, that Kessler & Company of New York were solvent.

3024 About ten o'clock on the 25th day of October, 1907, Henry Kessler went to the office of Kessler & Company and told Alfred Kessler that he was going to take charge of the securities. Alfred Kessler said: "All right. They are yours. Do what you like." Thereupon, Henry Kessler went with Albert Kessler to the North American Safe Deposit Company, took from the vaults of Kessler & Company, of New York, the separate packages of securities comprising the general and special "escrows" (with the exception of the 1,606 shares of United Lighting and Heating Co. stock and the

10,000 shares of Elkton Mining Co. stock), checked 3025 them off, found them correct as indicated by the list, hired a new safe deposit box in the name of Kessler & Company, Ltd., of Manchester, and placed the securities in the box so hired, giving right of access thereto to North McLean, Albert Kessler and Mr. Nestle, employees of Kessler & Company, of New York.

TENTIL.—After taking possession of said securities, Henry Kessler executed and delivered on behalf of Kessler & Company, Limited, an instrument in words and figures following, to wit:

"KNOW ALL MEN BY THESE PRESENTS that, 3026
Whereas Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, individually and as copartners, composing the firm of Kessler & Company, Bankers and Brokers of No. 54 Wall street, Manhattan, New York City, are justly and truly indebted to Kessler & Company, Limited, of Manchester, England, in the sum of Five hundred thousand Dollars (\$500,000.00) and upwards, and

WHEREAS the said firm of Kessler & Company of No. 54 Wall Street, Manhattan, New York City, have deposited with Kessler & Company, Limited, of Manchester, England, 3027
certain securities as collateral to the said indebtedness, which said securities are held in the name of Kessler & Company, Limited, in the safe deposit valuts in the North American Safe Deposit Company, in the City of New York, Now in order that the securities composing such collateral may be from time to time exchanged or replaced by the said Kessler & Company, of New York, without in any way impairing the total value of

3028

the securities so deposited as collateral to the said indebtedness, the said Kessler & Company, Limited, of Manchester, England, does hereby made, constitute and appoint as its agents for it and in its behalf, to act for the purposes hereinafter specified, the following gentlemen:—North McLean, Albert Kessler, Otto G. Nestle, and the said Kessler & Company, Limited, of Manchester, England, does hereby authorize and empower the said North McLean, Albert Kessler and Otto G. Nestle, and all or each of them, from time to time as may be requested by Kessler & Company, of New York, to allow the said Kessler & Company to re-place the securities so pledged as collateral to the indebtedness of Kessler & Company, of New York, to Kessler & Company, Limited, of Manchester, England, by other securities, providing that the total value of the said collaterals is not thereby lessened, except in proportion as the indebtedness is from time to time reduced, or as the same may vary from time to time.

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3030

IN WITNESS WHEREOF the said Kessler & Company, Limited, of Manchester, England, has caused these presents to be signed in its corporate name by Henry Kessler, Chairman of the Board of Directors and of the Company, this 25th day of October, 1907.

KESSLER & Co., LIMITED

H. KESSLER, Director.

Sworn and subscribed to before me }
this 26th day of Oct. 1907. }

PHILIP F. W. AHRENS,

Notary Public.

[NOTARY'S SEAL]

We, the undersigned North McLean, Al- 3031
bert Kessler, Otto G. Nestle, do hereby ac-
cept the trust and agency conferred upon us
by Kessler & Company, Limited, of Man-
chester, England, and agree to act faith-
fully as agents of the said Kessler & Com-
pany, Limited, in the premises.

IN WITNESS WHEREOF, we have hereunto
subscribed our names this 25th day of Oc-
tober, 1907.

NORTH MCLEAN,
ALB. KESSLER,
OTTO G. NESTLE."

2032

(Then follows acknowledgment by North Mc-
Lean, Albert Kessler and Otto G. Nestle on the
26th of October, 1907).

On the 30th of October, 1907, Henry Kessler exe-
cuted and delivered on behalf of Kessler & Com-
pany, Limited, an instrument in words and figures
following, to wit:

"KNOW ALL MEN BY THESE PRESENTS that
WHEREAS ALFRED KESSLER, RUDOLF E. F.
FLINSCH and WILLIAM K. GILLETT, individ-
ually and as co-partners, composing the firm
of Kessler & Company, Bankers and Brok- 3033
ers, of No. 54 Wall Street, Manhattan, New
York City, are justly and truly indebted to
Kessler & Company, Limited, of Manchester,
England, in the sum of Four hundred thou-
sand Dollars (\$400,000.00) and upwards,
and

WHEREAS the said firm of Kessler & Com-
pany of No. 54 Wall Street, Manhattan, New
York City, have deposited with Kessler &
Company, Limited, of Manchester, England,

3034

certain securities as collateral to the said indebtedness, which said securities are held in the name of Kessler & Company, Limited, in the safe deposit vaults in the North American Safe Deposit Company in the City of New York, and are now in the possession of and under the sole control of Kessler & Company, Limited. Now in order that the securities comprising such collateral may be from time to time exchanged or re-placed without in any way impairing the total value of the securities so deposited as collateral to the said indebtedness, the said Kessler &

3035

Company, Limited, of Manchester, England, does hereby make, constitute and appoint as its agents for it and in its behalf, for the purposes hereinafter specified, the following gentlemen: Albert Kessler and Otto G. Nestle and the said Kessler & Company, Limited, of Manchester, England, does hereby authorize and empower the said Albert Kessler and Otto G. Nestle and each of them, from time to time as may be requested by Kessler & Company, Limited, of Manchester, England, to allow any person, corporation or copartnership to replace the securities so pledged as collateral to the indebtedness of Kessler & Company, of New

3036

York, to Kessler & Company, Limited, of Manchester, England, by other securities, providing that the total value of the said collaterals is not thereby lessened, except in proportion as the indebtedness is from time to time reduced, or as the same may vary from time to time.

IN WITNESS WHEREOF the said Kessler & Company, Limited, of Manchester, England, has caused these presents to be signed in its

corporate name by Henry Kessler, Chair- 3037
man, of the Board of Directors and of the
Company, this 30th day of October, 1907.

KESSLER & Co., LIMITED,
H. KESSLER, Director.
[SEAL]

Sworn & Subscribed to before me }
this 30th day of Oct. 1907. }

PHILIP F. W. AHRENS,
Notary Public.

[NOTARY'S SEAL]

We, the undersigned, Albert Kessler and
Otto G. Nestle do hereby accept the trust 3038
and agency conferred upon us by Kessler &
Company, Limited, of Manchester, England,
and agree to act faithfully as agents of the
said Kessler & Company, Limited, in the
premises.

IN WITNESS WHEREOF we have hereunto
subscribed our names this 30th day of Oc-
tober, 1907.

ALBERT KESSLER
OTTO G. NESTLE."

(Then follows acknowledgment by Albert Kessler and Otto G. Nestle on the 30th of October, 3039
1907.)

ELEVENTH.—Kessler & Company of New York
notified Kessler & Company, Limited, of Manchester,
of the delivery of the two escrows by letter
as follows:

"NEW YORK, 25 Oct. 1907.

Messrs. KESSLER & Co. LIM.
Manchester.

DEAR SIRs:

We handed Mr. Henry Kessler today, your
two escrows as per list enclosed, please can-

3040

cel old list. You will notice we have put Daimler pfd in your escrow in place of common. We think eventually we ought to get something for the common stock too.

Mr. Henry Kessler took a separate vault box for these escrows, & Mr. Albert Kessler, Otto G. Nestle & North McLean have access to same. The box is in name of K. & Co. Lim Manchester, No. 2097.

Yours truly,

KESSLER & Co."

The list enclosed was as follows:

3041

"Escrow Kessler & Co., Ltd. Manchester.

2428 sh. United Lighting & Heat 10	\$24,280.
1606 " " in Manchester 10	16,060.
1341 " Daimler Mfg. Co. pfd. 100	134,100.
\$56,000 United Breweries, 1st M.	
6's	80 44,800.
50,000 United Breweries Notes ..	50,000.
1000 sh. Underground El., Ldn. }	
full paid	
2000 sh. Underground El., Ldn. }	49,663.13
Beneficial Cert.	
70 sh. Standard Roller Bearing,	
\$50 share	60 4,200.
2042 100 sh. Standard Roller pfd....	50 5,000.
10,000 sh. Elkton Mining Co.	50 5,000.
500 sh. U. S. Red. & Ref. Co. pfd.	25 12,500.
1000 sh. " com.	10 10,000.
\$45,000 Pittsburg. Westmoreland &	
Som. 1st 5's	95 42,750.
12,000 Ind. Col. & East Tract 1st	90 10,800.
288 sh. Muskogee Gas & Elect.	
Com.	20 5,760.
288 sh. Muskogee Gas & Elect.	
Pfd.	60 17,280.
\$22,000 Muskogee Gas & Elect.	
Refdg.	87 19,140.

Bedford Avenue Property	31,000.	3048
Western Pacific, Syn. rect.	7,234.28	
548 sh. Chicago Gt. Westn. Pfd. B. 10	5,480.	
\$20,000 Orleans County Quarry		
Co. 1st	90	18,000.
		<hr/>
	\$513,047.41	

Kessler & Co., Ltd., Special Escrow, £20,000, 60 d. s.		
\$25,000 Orleans County Quarry ..	\$22,500.	
Note, Milne, Turnbull & Co., due		
Nov. 11	16,000.	
Note, Milne, Turnbull & Co., due		
Dec. 27	7,000.	3044
Note, Milne, Turnbull & Co., due		
Dec. 27	17,000.	
Note, R. B. Maclea Co., due Dec 5	5,000.	
300 sh. Cripple Creek, Com.....	67	20,100.
466 " " Pfd.....	"	31,222.
		<hr/>
	\$118,822."	

TWELFTH.—On October 15th, 1907, Kessler & Company of New York drew draft as follows:

"Ninety days after sight this first of exchange, second unpaid, please pay to the order of Colonial Bank, Five Thousand Pounds sterling, value received. Charge same to account of Kessler & Company. 3045

To MESSRS. KESSLER & COMPANY, Manchester.

Payable in London. No. 203,265."

This draft was accepted as follows:

"Accepted 25th of October, 1907, payable at Lloyd's Bank, Limited, 71 Lombard Street.

KESSLER & Co., LIMITED,
P. W. KESSLER, Director."

3046 The following memorandum was also endorsed on said acceptance:

"The Colonial Bank is admitted a creditor, £5,000, in respect to this acceptance. December 16, 1907. KESSLER & Co., LTD. FRANK YOUATT, Liquidator."

THIRTEENTH.—On October 25th, 1907, Henry Kessler notified Kessler & Company, Limited, of Manchester, by cable as follows:

3047 "Have secured escrow. Financial affairs critical. Cannot sell demand. Is it possible arrange with Lloyd's Bank, Limited, cash loan against Cripple."

FOURTEENTH.—On the 25th of October, 1907, Henry Kessler wrote to P. W. Kessler, of Kessler & Company, Limited, as follows:

"KESSLER & Co. 54 Wall Street,
Bankers.

NEW YORK, 25th October, 1907.

DEAR WILLY:

3048 I wrote you on the 22nd inst. & received your 2 letters of 15th & 16th inst.; we have had two very miserable & exciting days here; you will have seen all from the papers how Morgan & others helped the Stock Exchange with funds. Alfred just comes with the news that they will issue Clearing house certificates, this they hope will relieve the money market. The great difficulty is to sell Exchange even checks and this has bothered McLean very much, however he succeeded in getting what he wanted for to-day; but the position is *very awkward* and we must hope that next week the Exchange market will be better as otherwise K. & Co.

like many others would be in a hole. I saw ³⁰⁴⁹ Guss yesterday. I asked him to buy some of our bills, but he said he didn't know what to do with them.

At the suggestion of Alfred I cabled you today if you could not arrange from Lloyds a Cash advance against Cripple Creek; however I doubt it.

Alfred sold a few stocks, but it is very difficult to get rid of anything & things outside the Stock Exchange are unsaleable and that is the reason why stocks have gone down so much.

The Central Trust Co. called today for ³⁰⁵⁰ the loan of \$100,000; but Alfred could arrange with Wallace to let it lie over until next week. He is naturally very much worried, but I am trying to calm him down. He cabled Flinsch today he wanted \$200,000 by Monday and asked him what he could do to find funds.

You have no idea how things are here. The Trust Co. of America was besieged the last two days by depositors wanting their money. Police on horseback and foot kept order in Wall Street. Of course, we can't say where all this will lead to, but things ³⁰⁵¹ seem a trifle better tonight and Saturday & Sunday may help to calm the excitement.

It is strange I anticipated all your ideas about our escrow as you will see from my memo. of yesterday. Your and Eddy's letters strengthened my hands and we acted on it at once. I went with Bertie to the North America Safe Deposit Co., Exchange Place, secured a small safe in the name of K. & Co., Ltd., Manchester, England, and gave power to Bertie, McLean & Nestle—Bacon would not have done—to open this

3052

safe. The combination No. of the lock is 197 and box No. 2097. We went carefully through all the documents to see that they are all endorsed and in order, the Brooklyn mortgage has a transfer in blank bt Gillett & his wife, the other notes are all endorsed in blank. I think we are safe now, now we are in possession of the documents. Alfred has made out a new list at *reduced* prices amounting to abt \$513,000 against the £80,000 credit. The other £20,000 are in the separate escrow also in our safe. To get anybody to take care of our bills here in case of need would be very difficult, probably impossible. Brooks would have to help us thro' against the securities we could give him. If K. & Co. can pull thro', which I hope, we must get out of this acceptance business or reduce it considerably.

3053

Alfred telephoned for Gillett to come down, he promised to come in the afternoon, but didn't. It is most harassing and annoying that the man is no good and cannot be tackled. I hope Flinsch will be here soon.

Alfred would like you to see if you cannot get a quotation in London about the Underground Electric London in our escrow.

3054

Saw Hesslein and Ernst yesterday, the latter is coming over next week. I was astonished what a large place theirs is, about 100 clerks and two large warehouses.

Called again on Abbs and asked him to push where he could for remittances. Hennings I saw this afternoon. He promised a small order presently. McLea I didn't find in but saw some of the goods he gets from Reade & Wall very fine and tasteful things up to 18. If Heide could find some

stuffs like it for Hesslein we could do a 3055 big business.

The rest of the day I spent at Wall Street and must say I have by now had more than enough of it. I hope I can get off by Baltic next week but will first see how things are going here before I decide. * * *

Betrie and Nestle dined with me yesterday and they want to take me a motor ride to-morrow. * * *

FIFTEENTH.—On or about the 7th of October, 1907, Henry Kessler received a cablegram from Manchester from P. W. Kessler, who at that time 3056 appears to have been in charge of the Manchester Company, as follows:

"Flinch here twelve A. M. Their positions not at all satisfactory. Please consult A. K. Would advise selling stocks. Are trying here arrange loan against Orleans Cripple; success doubtful. Do not approve of more Manchester. What is best that can be done?"

And on the 8th of October, 1907, Alfred Kessler wrote to his partner, Mr. Flinsch, as follows:

"Yesterday we got your and Willie's cable to Henry, who could give me no advice and 3057 went to Philadelphia. The cable read: 'Flinsch here twelve A. M. Their position not at all satisfactory. Please consult A. K. Would advise selling stocks. Are trying here arrange loan against Orleans Cripple; success doubtful. Do not approve of more Manchester. What is best that can be done?' This last sentence is the great conundrum which cannot be solved. To-day I cabled reply, 'Henry Kessler, Philadelphia. We have arranged balance Orleans. Flinsch's father should help.'"

3058 SIXTEENTH.—On the 24th of October, 1907, Henry Kessler sent a letter, called in his letter of the 25th "memo. of yesterday," in which he told P. W. Kessler of the advice Messrs. McLaughlin, Russell, Coe & Sprague had given him the day before with regard to his obtaining possession of the securities, and on the 25th of October, 1907, in the morning, Henry Kessler received a letter from P. W. Kessler advising him to see about the escrow and perhaps consult lawyers and see what ought to be done in case of necessity.

On the 25th of October, 1907, Alfred Kessler cabled Flinsch as follows:

3059 "Financial affairs critical. Cannot sell demand. Central Trust Company has called loan one hundred thousand. We require one million marks October twenty-eighth. Can you obtain?"

Henry Kessler was informed on October 25th that Alfred Kessler had cabled abroad for \$200,000; that is to say, he was informed of the contents of the said cable to the effect that Kessler & Company required 1,000,000 marks (\$200,000) by October 28th.

SEVENTEENTH.—The statements of facts relevant
3060 to the controversy herein involved contained in the letter of Henry Kessler to P. W. Kessler, of Kessler & Company, Limited, set forth in the Fourteenth Finding of Fact, I find to be correct and true statements of such facts.

EIGHTEENTH.—On the 29th of October, 1907, Henry Kessler sent a cablegram to Kessler & Company, Limited, of Manchester, as follows:

"Escrow in my strong box. Estimated value six hundred thousand. Perhaps realize eventually three hundred thousand. Stocks in negotiable shape, private invest-

ments, with coupons, in my strong box. Not ³⁰⁶¹
advisable to disturb stocks at the moment
for transfer."

On the 30th of October, the following cablegram
to Kessler & Company, Limited, of Manchester, was
sent by Henry Kessler:

"Assigned Kisskin advice ask Lloyds Bank
Limited Manchester advance against col-
lateral escrow. Cannot obtain advance here
now * * *

The words "assigned Kisskin advice" mean that
Kessler & Company of New York had made an as- ³⁰⁶²
signment pursuant to the advice of Kissell, Kinni-
cutt & Company.

NINETEENTH.—The Knickerbocker Trust Com-
pany suspended payment on Tuesday, the 22d of
October, 1907, and immediately thereafter a run by
depositors began on the Trust Company of America,
which continued for several days thereafter. On
October 23d, 24th, 25th and 26th, it was exceedingly
difficult to borrow money in New York City. On
Friday, the 25th, money was loaned in Wall Street
at 115 per cent. On Monday, the 28th, and Tues-
day, the 29th, Alfred Kessler applied to various in- ³⁰⁶³
stitutions and individuals for loans, without suc-
cess. On Friday, the 25th, the Central Trust Com-
pany called a loan of \$100,000, but, at the request
of Kessler & Company, payment of the loan was
extended until the following week. The City Na-
tional Bank loan of \$100,000 and a loan
of some \$90,000 of the Mechanics' Bank, aggregat-
ing \$190,000, were taken up by J. P. Morgan & Com-
pany, who received from the City National Bank
and the Mechanics' Bank the collateral se-
curity of Kessler deposited for those loans. Dur-
ing the weeks beginning October 21st and October

3064 28th, in addition to the Morgan loan, Kessler & Company obtained a loan from the Merchants' National Bank of twenty or twenty-five thousand dollars. They required during the week commencing October 28th to meet their liabilities in Europe some \$500,000. On the evening of the 29th of October, after conference with Kissell, Kinnicutt & Company, Alfred Kessler concluded to make a general assignment, and thereupon, on the 30th of October, a general assignment was made for the benefit of creditors, which assignment was executed by Alfred Kessler on behalf of the firm. This assignment recited that the firm was unable to pay
 3065 its debts in full. Flinsch was at that time on board a steamer coming from Europe, and Gillett, the other partner, was ill and did not attend to any business at the office.

TWENTIETH.—There was no substantial change in the pecuniary condition of the firm between the 25th and the 30th of October. The chief business done during that period was in foreign exchange, and the result thereof was a loss of about \$500. During those days, Alfred Kessler tried to get moneys for the firm from his partner, Gillett, or from Flinsch's friends in Europe or by obtaining loans, but was disappointed in his expectations,
 3066 and on the 30th the assignment for the benefit of creditors was made. Up to and including October 29th, the firm of Kessler & Company of New York met their obligations as they matured.

A petition in involuntary bankruptcy was filed against the bankrupt firm on November 8, 1907, and Lawrence E. Sexton was on that day appointed Receiver, and thereafter the firm were adjudicated bankrupts. Schedules of the firm's assets and liabilities were filed on December 26th, 1907.

TWENTY-FIRST. From the early part of the year 1907, down to their bankruptcy, the great bulk of

the assets of Kessler & Company consisted of securities which were not listed on the New York Stock Exchange. During this period, it was difficult to sell these securities even at a great sacrifice, and difficult to borrow money thereon. Many of these unlisted securities had been carried by the house for a period of one, two and three years, and had been acquired in large part in various underwritings which had not been successful, and the firm were compelled to take over the securities and had been waiting for a favorable time to sell them. During this period, there was a decline in price not only of unlisted securities, but in first-class securities. In May, 1907, a verdict in the Supreme Court for \$140,000 had been obtained by a creditor against the firm, and Flinsch, when in Paris, had an interview with the creditor with a view to settling the case, and stated to him that a judgment would have an injurious effect upon the credit of the firm. 3067 3058

In June, 1907, Flinsch went abroad, arriving in London on the 25th, and remained in Europe until a few days before the assignment of his firm. While abroad, he made various efforts to strengthen the financial condition of the firm. These efforts were, in the main, unsuccessful, and the drawing accounts of Kessler & Company upon their various correspondents in Europe were curtailed instead of increased. Flinsch, during his absence in Europe, corresponded frequently with Alfred Kessler in New York, informing him of such efforts and their result. By the letter of July 18th, 1907, he reported to Alfred Kessler, among other things, as follows: 3069

"What surprises me regarding these credits, which are being called, is the fact that they were not called sooner. I have never found people as blue as at present. It does not surprise me. I have been looking forward to it for the last eighteen months.

3070

I advise you strongly to make some temporary drawing arrangement with Manchester for twenty thousand pounds. * * *

"I think it impossible to get credits in new directions; in fact, I think it impossible just at present to get old ones renewed. * * *

3071

The subsequent letter indicated that Flinsch was endeavoring to collect from his father and brothers moneys owing to Kessler & Company, apparently being the subscriptions for securities that Kessler & Company had put on the market. With respect to the collection of his father's account, Flinsch is fearful of the effect of showing to the Frankfort banking circles Kessler & Company's need of money.

TWENTY-SECOND.—Among other business carried on by Kessler & Company was that of financing the business of the dry goods firm of Milne, Turnbull & Company. The business of Milne, Turnbull & Company was in an unsatisfactory condition, and in one letter Flinsch urged the sale of the stock of goods of Milne, Turnbull & Company at any price. In the course of his correspondence with Alfred Kessler, he suggested that the latter call in outstanding accounts receivable.

3072

While abroad, he saw P. W. Kessler, of Kessler & Company, Limited, first at Baden-Baden on September 17th, and about the 7th of October at Manchester. That the financial condition of Kessler & Company of New York was discussed in the interview between Flinsch and P. W. Kessler at Manchester on October 7th is apparent from the cablegram of P. W. Kessler to Henry Kessler, in which the visit of Flinsch is referred to. This cablegram is set forth in the Fifteenth Finding.

TWENTY-THIRD.—The relations between Kessler & Company of New York and Kessler & Company, Limited, of Manchester, were exceedingly close and

marked by mutual good-will and confidence. The 3073
correspondence by mail was frequent, and this correspondence shows that the Manchester Company was posted from time to time as to the financial condition of the New York firm. Some of the correspondence relative to the "escrow" passed through the private letter books of Kessler & Company. The following letter, under date of August 27th, 1907, was sent by Alfred Kessler to P. W. Kessler of Manchester, and received by him:

"I have yours of 25th July, 3rd and 14th Aug., and the worries I have gone through in the last two weeks have been phenomenal. Cables and correspondence with Flinsch and 3074 others have taken up most of my time. I communicated at once to Flinsch what you had heard from Frankfort, thinking it was much wiser to let him know.

"Flinsch's brother Edgar paid Mks. 45,000 and Remy Mks. 10,000. His father promises Mks. 100,000, but we have not got it. Mr. De Neuville paid everything she owed and his wife Olga \$6,200, plus \$15,000, which I expect any day now.

"Drawing. Not having been able to sell Fcs. 770,000 against Cripple Cr. stock, we were forced to sell £20,000 Manchester, and 3075 put up escrow as per separate letter * * *

On the 6th of September, 1908, Alfred Kessler, in a letter to P. W. Kessler, acknowledges the receipt of

"your letters of 22 and 23 Aug. and the one to the firm of 23 Aug. and I am dreadfully sorry to have caused you worry. Indeed I have had lots to worry about and often had to take doses to get some sleep. 1893 and 1903 worries were nothing compared to last month for reasons of so many credits being called

2076

and the inability to sell any of our Laager Huets. fr. 1,000,000 long bills on Dreyfus became due and we could not renew. * * * Flinsch has seen Dreyfus in Paris and they have arranged only to be drawn on by us, so I hope the bills by others will not be renewed and there will be little Dreyfus in the Paris market.

3077

"To-day we were able to sell fcs. 500,000 90 d/s on them and Flinsch has arranged for us to draw on Lou & Co., Zurich, fcs. 500,000. Heine will also discount fcs. 250,000 of bills for us, and the Basler Handelsbank will discount fcs. 250,000 against merchants bills receivable. These two latter P. has only cabled about so we must await their letters next week."

In this and the previous letter he speaks of the difficulties existing between the firm and Gillett, one of the partners. "The Daimler is undoubtedly going to cause us a loss as the Co. was not fully insured by \$100,000 but we could not get any more insurance on it—as it was the \$308,000 was divided in 153 companies."

3078

Kessler & Company owned substantially the stocks and securities of the Daimler Company.

"Pittsburg Westmoreland earnings are poor. * * * The loss on bonds ten points and stocks 15 to 20 points is also bad but may improve and the market and feeling are much better. MacLea account is very good. Milne, Turnbull account is not good, in fact they have run behind, \$7,000. Shipley Blauvelt account and Orleans County Quarry are both good. Daimler, Pittsburg, Westmoreland and Cripple Creek Central which is so hard to carry are our *betes noires* and the truth is that our condition is not as

good as it was end of last year and how Gil-³⁰⁷⁹
lett is to get out and we to get a new partner
unless you is a conundrum. Of course if
Flinsch sells C. C. C. the two former will
still trouble us.

"Muskogee Gas and El. fine, earning
\$30,000 above 6% div. on pfd. * * *

"Loans payable to-day are \$600,000, but
with exception of \$180,000 are all salable se-
curities and a great many belong to other
parties."

At the end of the letter he says:

"Now, dear Willy, please do not worry,³⁰⁸⁰
as I am doing that for the whole family, but
don't fail to see Flinsch before he returns."

On the 11th of October, in a letter to P. W. Kess-
ler, Alfred Kessler wrote as follows:

"I received your letters of 4 and 25 Sept.

"United Brewery bonds are unsalable in
fact all bonds are except the active ones on
the stock exchange and those suitable for sav-
ings banks (of which we have none). The
earnings for Aug. were very good \$44,000 net
after fixed charges and they say after 1 Nov.
they say they expect to boost the price of³⁰⁸¹
beer. The bonds are absolutely good and
situation is much improved. * * *

"In answer to your cable to Henri I cabled
as per copy enclosed. Flinsch kept promis-
ing his father would send \$20,000 but he
never did. I wrote a long letter last mail,
but what to answer to the last words in your
cable, 'what is best that can be done,' I am
sure I cannot say. Stocks are so low now
I hate to sell and the best houses have many
more buying orders than selling orders."

3082 In the letter under date of October 17th, Alfred Kessler writes P. W. Kessler as follows:

"Yours of 8th and 9th October also received. No bonds are salable so Bertie could not do anything, see enclosed cutting.
* * *

"Stock market continues in a very nervous state. Amalgamated div. was cut in half to-day and Otto Heinze & Co. failed. The buying was very good and the public are at last entering the market cautiously. I expect easier money a month hence and bonds ought to improve."

3083

On the 18th of October he says:

"The Mercantile National Bank of which Heinze was president has been taken over by other banks and all of the directors have resigned. The bank had deposits of \$12,000,000.

"I translated your cable to Henri and sent it to him at Atlantic City."

In a letter of the 26th of September, P. W. Kessler acknowledged the receipt of Alfred Kessler's letter of the 6th and says:

3084

"It was much what I expected and not altogether pleasant reading. I sent it on to Eddy for his comments. I am very sorry for you, but with that enormous line of drawings on us, I am afraid I cannot leave all the worry to you. If those drafts should want caring for, we should find ourselves in a very bad hole, and I must say I am not easy.
* * *

"The stock acct. does seem big in sundries, especially so at a time when a slump seems so likely to come. The worst is that I am afraid there is more to come and that unless

you have got out you will have a further 3085
shrinkage to face. * * *

"Henri has just gone. He may possibly be useful to you if you are having trouble with Gillett and of course he is also an executor of the estate and can have a say on that head, tho' so far, all this has been mostly in my hands. But he is better at talking than I am and may thereby accomplish more than I should.

"That Westmoreland thing begins to look awkward. I hope you don't have to go on putting more money into it. It ought, of course, never to have been touched. 3086

"Are U. S. Brewery bonds salable yet? I should have thought Chicago might have gradually taken to them. And if you don't care yet to sell your own, some of the people for whom you are carrying might be willing to let go. You just want all the cash you can put your hands on.

"I don't know that I can say anything more, but I do feel anxious and should particularly like to hear how you are getting on with Gillett. * * *

TWENTY-FOURTH.—The securities mentioned in the list set forth in the eleventh paragraph hereof 3087 as 1,606 shares of the United Lighting & Heating Company were not in the "escrow" at the time of their delivery on October 25th, but were in Manchester, England, where they had been in the possession of Kessler & Company, Limited, since about January, 1904. The 10,000 shares of Elkton Mining Company were not in the "escrow" at the time of said delivery, but were in the hands of brokers of Kessler & Company in Colorado. These shares arrived in New York after the assignment, and by Bertie Kessler were turned over and added to the other securities in the "escrow" in the safe deposit

3088 vault which had been taken by Kessler & Company, Limited, and on or about the time of the delivery of the "escrow" to Henry Kessler, Kessler & Company put 1,341 shares of Daimler Manufacturing Company preferred stock in place of 1,341 shares of common stock which previously had been in the "escrow."

TWENTY-FIFTH.—The four drafts each of five thousand pounds, each drawn by Kessler & Company upon Kessler & Company, Limited, of Manchester, each at sixty days' sight, on the 27th of August, 1907, were on that day purchased by J. & P. Coats, Limited, from Kessler & Company of New York, to whom, on the same day, J. & P. Coats, Limited, paid as consideration for the said drafts \$97,550. These drafts were forwarded to Manchester and accepted in due course on the 7th of September, 1907, and became payable on November 6, 1907. On December 4, 1907, J. & P. Coats, Limited, received from the liquidator of Kessler & Company, Limited, in liquidation, a dividend amounting to £625 1s. on each of said drafts.

TWENTY-SIXTH.—The course of dealing with regard to the "escrows" was as follows: Kessler & Company of New York drew long bills—that is, bills at either sixty or ninety days' sight, and occasionally at seventy-two days' sight—upon Kessler & Company, Limited, and about ten days before these long drawings fell due it was the custom of the New York house to send a remittance to cover them. The New York house had never, at any time from the beginning of its drawings on Kessler & Company, Limited, down to the 25th of October, 1907, failed to put Kessler & Company, Limited, in funds to meet any of the drafts which were drawn on them.

TWENTY-SEVENTH.—Kessler & Company of New York at all times collected the coupons and interest on the securities in the "escrow" whenever they became payable, and the moneys so received went into the bank account of Kessler & Company of New York and were used for the purposes of their business, never at any time being accounted for to Kessler & Company, Limited; and such was the case where any part of the principal of a note was paid off. In some cases, Kessler & Company of New York took out and sold some of the securities, and in some cases they took them out and used them in some other loan, and the securities so taken out and sold or taken out and used to obtain loans were replaced by other securities.

TWENTY-EIGHTH.—The schedules of the assets and liabilities of the bankrupt firm, which were duly verified by the bankrupts, Kessler and Flinsch, on December 26th, 1907, indicate that the liabilities of the firm exceed the assets by over \$250,000, but in the valuation of their assets the securities in the two "escrows" are valued by the bankrupts in the aggregate sum of \$495,000.

I find from the testimony of one of the appraisers appointed herein, who was a competent expert, that the value of the securities in said "escrows" would not probably exceed the sum of \$257,495, including the value of the securities in the special or August "escrow," \$48,300. Making this correction, the excess of liabilities over assets amounts to about \$500,000.

The claims of secured creditors as set forth in the schedules amount to \$2,414,337.83, and the unsecured claims \$1,403,723.36.

Among the assets entered in Schedule B-2b is the item "Promissory notes and securities, \$152,499.38." The collateral for these notes is made up almost entirely of securities not listed upon the Stock Ex-

3094 change or participations in syndicates of doubtful value. Both these classes of securities at the time of the failure were stocks that could only be sold, if at all, at a great sacrifice. The par value of the securities held as collateral for the indebtedness was only \$158,200, so that the estimate of the value of the assets in Schedule B-2b of \$152,499.38 is probably greatly in excess of the value of the securities.

Another item of assets set forth in Schedule B-3a is "Debts due on open account, \$998,601.03." The face value of this item in the schedules is \$1,570,255.69, and the estimated value of the collateral, 3095 made up for the most part of unlisted securities and participations in various syndicates, is \$788,420.36.

One of the items in Schedule B-3a is an indebtedness of Milne Turnbull & Company, entered in the schedule at \$99,582.29, and the value is therein entered at \$81,751.93. A petition in involuntary bankruptcy was filed against Milne, Turnbull & Company on November 13th, 1907, and the value of this asset is problematical.

3096 TWENTY-NINTH.—On the 25th of October, 1907, there were outstanding drafts of Kessler & Company accepted by Kessler & Company, Limited, to the aggregate amount of over \$300,000. Kessler & Company, Limited, thereafter went into liquidation, and thus far a dividend of 12% has been paid by the liquidator on said acceptances.

THIRTIETH.—I find, as a matter of fact, that on the 25th day of October, 1907, when the transfer of the "escrows" was made, Kessler & Company, the bankrupt firm, were insolvent within the meaning of the bankrupt law, and defendants are chargeable with knowledge of such insolvency.

THIRTY-FIRST.—I also find, as a matter of fact, that Kessler & Company, Limited, at the time of

the transfer to it on October 25th, 1907, of said 3097
 "escrows" or securities, had reasonable cause to
 believe that it was intended by said transfer to
 give it a preference.

THIRTY-SECOND.—I find that the effect of the
 transfer by the bankrupts to Kessler & Company,
 Limited, on the 25th of October, 1907, of the se-
 curities in the "escrow," hereinbefore mentioned,
 will be to enable Kessler & Company, Limited, to
 obtain a greater percentage of its debt than any
 other of the creditors of the bankrupt of the same
 class.

The courts hold that a condition of insolvency, 3098
 once established, will be presumed to have been
 the condition for a reasonable time before.

The State of New York *v.* Southern
 National Bank, 170 N. Y., 1.

The books of the bankrupt and their schedules
 are competent evidence on the question of insol-
 vency within the four months' period.

In re Docker-Foster Company, 10
 American Bankrupt Reports, 584;
Hackey v. Hargreaves Brothers, 13
 American Bankruptcy Reports,
 164; Opinion, page 169; and cases 3099
 there cited;
Collier on Bankruptcy, 6th ed., page
 477.

The schedules of the bankrupt, as we see, show
 a deficit of over half a million. The further facts
 appear by the testimony that a large portion of
 the assets of the bankrupt consisted of securities
 that were not listed on the Stock Exchange and,
 at the date of the 25th of October, 1907, were prac-
 tically unsalable. An examination of the sched-
 ules also indicates that such securities of the bank-

3100 rupt as were listed and could, therefore, be sold were, for the most part, pledged as collateral for loans. A consideration of all the evidence and circumstances in the case, lead, it seems to me, to the inevitable conclusion that on the 25th of October, 1907, the bankrupts were hopelessly insolvent.

The property transferred may be recovered by the trustee irrespective of the intent of the bankrupt in making the payment.

16 American Bankruptcy Reports,
639.

3101 It is not necessary that any actual fraud should be contemplated by the making of the transfer. If the effect of the transfer is to give one creditor a preference over another in the same class, or to enable such creditor to obtain a greater percentage of his debt than any other of such creditors of the same class, the transfer becomes voidable, if made within the four months' period, upon the adjudication in bankruptcy, and the trustee can recover the property transferred.

Morgan *vs.* First National Bank of
Mannington, 16 American Bank-
ruptcy Reports, 639; Opinion, page
644.

3102

Did Kessler & Company, Limited, have reasonable cause to believe that the transfer was intended to give preference?

Henry Kessler, who actually received and took possession of the securities on the 25th of October, 1907, was the chairman and managing director of Kessler & Company, Limited. In his absence, P. W. Kessler appears to have had charge of the affairs of Kessler & Company, Limited, at Manchester. It is a significant fact that P. W. Kessler suggested to Henry Kessler that he had better get

possession of the securities in the "escrows." In 3103 the letter of Henry Kessler to P. W. Kessler dated the 25th of October, 1907, Henry Kessler says: "It is strange I anticipated all your ideas about our escrow, as you will see from my memo. of yesterday. Yours and Eddy's letter strengthened my hands, and we acted on it at once."

Alfred Kessler's correspondence with P. W. Kessler was full, free and confidential. It clearly advised P. W. Kessler of the precarious condition of the New York firm. As early as the letter of August 27th, 1907, from Alfred Kessler to P. W. Kessler, the latter was informed that "we (*i. e.*, Kessler & Company, the bankrupts,) were forced 3104 to sell £20,000 Manchester and put up escrow as per separate letter."

On the 6th of September, Alfred Kessler wrote acknowledging the receipt of P. W. Kessler's letters of the 22d and 23d of August and says: "I am dreadfully sorry to have caused you worry. Indeed I have had lots to worry about and often had to take doses to get some sleep. 1893 and 1903 worries were nothing compared to last month for reasons of so many credits being called and the inability to sell any of our Laager Huets. Fr. 1,000,000 long bills on Dreyfus became due and we could not renew," etc. He also informed him that 3105 "The Daimler (*i. e.*, the Daimler Company, which Company and its securities were substantially owned by Kessler & Company) is undoubtedly going to cause us a loss, as the company was not fully insured by \$100,000"; informed him also that "Milne, Turnbull account is not good, in fact they have run behind \$7,000"; and informed him also that "Daimler, Pittsburg, Westmoreland and "Cripple Creek Central which is so hard to carry are our *betes noires*."

On the 7th of October, Henry Kessler received

3106 a cablegram from Manchester from P. W. Kessler, in which he says:

"Flinsch here twelve a. m. Their position not at all satisfactory. Please consult A. K. Would advise selling stocks. Am trying here arrange loan against Orleans Cripple; success doubtful. Do not approve of more Manchester. What is best that can be done."

Henry Kessler arrived in this country on the 4th of October. He called at the office of Kessler & Company on the 5th of October and saw Albert
 3107 Kessler, Mr. McLean and Mr. Nestle, prominent employees in the firm of Kessler & Company, and, on the 7th of October, he there saw Alfred Kessler, besides Albert Kessler and Nestle and McLean. He received the cablegram of P. W. Kessler speaking of the interview with Flinsch and stating that the position of Kessler & Company of New York was not at all satisfactory. He went to Philadelphia on the 8th and did not return to New York until the evening of the 21st, when he saw Alfred Kessler. On the 22d, he visited the office of Kessler & Company. On that day the Knickerbocker Trust Company suspended payment and on the
 3108 next day a run commenced on the Trust Company of America. He was in New York, except for a journey to Philadelphia on the 23d, all of that week. On Friday of that week, the 25th, the transfer was made.

Henry Kessler was called and examined on the hearings before me. He was not a candid witness. He was evidently upon his guard and testified in a manner calculated to give the impression that the panic in Wall Street during the week commencing October 21st and thereafter had made little or no impression; at any rate, had little or no bearing upon the financial condition of Kess-

ler & Company when, however, his letter of 3109 October 25th was put in evidence, and certain cablegrams which, it was proved, were sent to him and received by him here in New York, were shown to him, his memory was considerably refreshed. The real state of his mind on the day he took possession of the securities is graphically shown by that letter, which is substantially set out in the fourteenth finding herein.

It would seem to be remarkable, considering the close and confidential relations existing between the Manchester Company and the New York house, that Henry Kessler made no inquiries and had no confidential talks with Alfred Kessler or 3110 any of the employees of Kessler & Company who enjoyed their confidence. If no such enquiries were made, then it is fair to conclude that Henry Kessler closed his eyes purposely to what was going on and avoided, as far as he could, making any enquiry into the condition of Kessler & Company.

The testimony of the bankrupts shows, at least, a friendly feeling towards Kessler & Company, Limited, which, perhaps, was only natural, considering the close business and family relations and connections, but their attitude in this regard must be taken into consideration in weighing their testimony bearing upon the question of their insolvency and the knowledge that Kessler & Company, 3111 Limited, had in relation thereto. It was natural that Alfred Kessler should have made every reasonable effort to avoid failure and bankruptcy, and it is natural for a person in his condition to hope against hope and to delay the unavoidable collapse as long as possible. If he had, on the 25th of October, 1907, looked the situation squarely in the face and taken a complete and impartial view of the circumstances of the firm, its liabilities and assets, the nature of its assets and the conditions then existing in Wall Street and generally in the

3112 business world, his conclusion must have been that the firm was insolvent and could not avoid failure.

Sufficient facts and circumstances were brought to the notice of Henry Kessler to put him upon his inquiry. The rule in such cases is stated by the Circuit Court of Appeals in the Eighth Circuit in the case of *Coder v. McPherson*, 18 American Bankruptcy Reports, 523, as follows:

“Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop.”

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Sufficient facts had been called to the attention of Henry Kessler, who was a person of large business experience and reasonable prudence, to put him upon his inquiry. P. W. Kessler, from the distance of Manchester, was sufficiently alarmed to suggest that Henry Kessler had better get possession of the collaterals. Henry Kessler could not shut his eyes, make no inquiries and take possession of these securities without making himself chargeable with notice of all the facts which a reasonably diligent inquiry would develop.

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The rule has recently been set forth in a case in this District in an opinion by Judge Hough, the case being that of *Wright v. Sampter*, 18 American Bankruptcy Reports, 355. At page 357, the court say:

“But obviously facts, whether producing certainty or merely suspicion, must have a mind upon which to operate and affect, and the rule is equally well established that it is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of ‘an ordinarily intelligent man’ (*Grant v. Bank*, 97 U. S. 80; ‘a prudent

business man' (Bank *v.* Cook, 95 U. S. 343; 3115
 Toof *v.* Martin, 13 Wall. 40); 'a person of
 ordinary prudence and discretion' (Wager *v.*
 Hall, 16 Wall. 584; 'an ordinarily prudent
 man' (*In re* Eggert, 4 Am. B. R. 449); 'a
 prudent man' (Dutcher *v.* Wright, 94 U. S.
 553).

The fact is uncontradicted that Henry Kessler
 was advised by counsel to get possession of the se-
 curities in "escrow," and it was shown that P. W.
 Kessler suggested the same course at or about the
 same time. Why did they wish to get possession of
 these securities? Because they felt, or, at least,
 hoped, that the possession of these securities would
 be a protection *pro tanto* against the indebtedness
 of Kessler & Company of New York to the Man-
 chester Company. In other words, they wanted to
 secure a preference; they wanted to get an advan-
 tage over other creditors. 3116

I conclude, therefore, as a matter of fact, that
 Kessler & Company were insolvent on the 25th day
 of October, 1907, and that Kessler & Company,
 Limited, had reasonable cause to believe that the
 transfer on such day was intended to give it a
 preference, and that the effect of the preference was
 to enable it to obtain a greater percentage of its
 debt than any other creditors of the same class. 3117

The contention of the defendant is, in substance,
 that the transfer, though actually made on the
 25th of October, related back to the time the ar-
 rangement for the deposit of the securities in escrow
 was made, and, therefore, the transfer was not
 made within the four months. It becomes neces-
 sary, therefore, to examine the nature of the agree-
 ment between the parties and the dealings of the
 parties thereunder, so far as they bear upon the
 proper interpretation of the agreement.

On the 30th of June, 1903, Kessler and Company
 of New York notified Kessler and Company,

3118 Limited, as follows: "We have to-day placed in a separate package in our safe deposit vaults the following securities, package marked 'Escrow for account of Kessler & Company, Limited, Manchester.'" A list of the securities follows. "This escrow is intended as a protection against our long drawings against your good selves. Kindly confirm if in order, and oblige."

On July 8th, Kessler & Company, Limited, replied: "We are in receipt of your favor of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up 3119 to us and the matter goes in order. If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality."

In December, 1903, Kessler & Company, Limited, wrote to Kessler & Company of New York as follows:

3120 "For the purposes of auditing of our books for our New York balance sheet, we should feel obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against your drawing credit with us. We should like this done annually on the 31st of December. We do not think the matter will prove of any difficulty to you. Something in the form of the enclosed is what we require," etc.

This enclosure was as follows:

"We certify that we have specially set aside and hold for your account on this 31st day of December, 1903, as security for the drawing credit which you accord us, the following securities," &c.

This agreement was prospective in its nature. 3121
 It does not appear that at the time these securities were set aside there were any long drawings against which Kessler & Company, Limited, required or needed any protection. In fact, during the whole period from June 30th, 1903, down to October, 1907, it does not appear that these securities were needed for the protection of Kessler & Company, Limited. On the contrary, it affirmatively appears that Kessler & Company of New York from time to time put Kessler & Company, Limited, in funds sufficient to pay or meet the long drawings of Kessler & Company of New York, on Kessler & Company, Limited, as the same became payable. 3122

In the agreement referred to in the tenth finding of fact, dated the 25th of October, and apparently executed on the 26th by Kessler & Company, Limited, Henry Kessler, Director, there is a recital to the effect that Kessler & Company of New York was indebted to Kessler & Company, Limited, in the sum of Five hundred thousand dollars and upwards and a further recital as follows: "Whereas the said firm of Kessler & Company, of No. 54 Wall Street, Manhattan, New York City, have deposited with Kessler & Company, Limited, of Manchester, England, certain securities as collateral to the said indebtedness," etc. 3123

The contention of the respondent that the agreement, as evidenced by these letters and the course of dealings between the parties, transferred the title to these securities to Kessler & Company, Limited, to hold the same in trust, first for their own protection and then for the benefit of Kessler & Company of New York, seems to me to be without foundation. The language used in the letters by the parties and in the agreement of October 25th, and their course of dealing, do not indicate that such was the nature of the agreement. It is natural to suppose that, if the title to these

3124 securities had been transferred in trust for the purpose claimed, the parties would have expressed such intention in apt words; but no such words were used. On the contrary, the words used and the course of dealing whereby Kessler & Company of New York were at liberty to exchange the securities when they saw fit, indicate that the title was to remain in Kessler & Company of New York and that the securities set aside should be for the protection of the Manchester Company when such protection should be required.

The course of dealing whereby Kessler & Company from time to time, and at all times up to 3125 October, 1907, protected Kessler & Company, Limited, by other means than these securities, against their long drawings, indicates that these securities were not to be transferred to Kessler & Company, Limited, unless they were required for their protection.

The letter of July 8th and the certificate which, at the request of Kessler & Company, Limited, Kessler & Company gave on the 31st of December, 1903, show that the property was set aside to be collateral security when required. The certificate is:

3126 "We certify that we have specially set aside and hold for your account on this the 31st day of December, 1903, as security for the drawing credit which you accord us, the following securities," etc.

The use of the word "escrow" has some significance. It indicates here an incomplete transaction. The language used in the letters and certificates and the course of dealing show an intention or promise on the part of Kessler & Company to make a valid pledge at some future time or when required for the protection of Kessler & Company, Limited. The title to the securities did not pass

to Kessler & Company, Limited, either in trust or ³¹²⁷ otherwise.

The respondent further claims, assuming that the agreement amounted to no more than a promise to pledge, that when the securities were actually delivered upon the 25th of October, the pledge was complete and therefore the pledgee had a good title as against the Trustee in Bankruptcy, and that such pledge must be considered as of the date when the promise for the pledge was made, to-wit, in June, 1903.

Lowell on Bankruptcy, section 86, page 66, says with respect to a promise to give security:

"In this country, a promise to give security ³¹²⁸ at some future, indefinite time, or when required, or a general covenant for further security, will not authorize the debtor to give and the creditor to receive security under circumstances which would make a preference. In other words, the general and indefinite promise is disregarded. A *bona fide* engagement to convey specific property amounting to an equitable lien will, however, be valid, and this is the test."

To which class of promises does the case at bar belong? Was the promise of Kessler & Company ³¹²⁹ of New York only a promise to give security at some future, indefinite time or when required, or was it a *bona fide* engagement to convey specific property amounting to an equitable lien and hence valid?

At the time the promise was made, it can hardly be said to amount to an engagement "to convey specific property," for Kessler & Company, Limited, in their letter to Kessler & Company of New York, dated July 8th, 1903, say: "If at any time you have an opportunity of realizing on these securities, or any part of them, you are at liberty to take them

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3130 and to replace them by others of equal value, though in that case we should, of course, like to see rather better quality."

In the course of dealing between the parties with respect to these securities, Kessler & Company of New York from time to time took from these securities and put others in their place. In no instance of this kind does it appear that, before doing so, they notified the Manchester Company that they proposed to do so, or consulted with them as to the securities they should take out from, or the securities they should put into, the escrow, so-called. The New York house would notify the
3131 Manchester Company of what they had done, after the fact, and it does not appear that at any time the Manchester house made any objection or any complaint whatever with respect to this exchange of securities. The conduct of the Manchester Company in this respect was perfectly natural. In the course of dealing, the New York house in all cases, down to the time of its suspension, put the Manchester Company in funds to meet the long drawings. The contingency whereby the escrow would be needed for the protection of the Manchester Company against the long drawings it evidently considered very remote.

3132 The "escrow" as originally constituted, as appears by the letter of June 30th, 1903, was made up of four different classes of securities. The "escrow" when delivered on October 25th to Henry Kessler was made up of twenty items. Of the four classes of securities in the original escrow, only one seems to have remained unchanged, and that is the items of shares of United Lighting & Heating Company stock.

The promise, then, or agreement, at the time it was made, was general and indefinite both with respect to the time and also as to the subject-matter of the promise. That is to say, the promise

amounts to this: "We will at some future, in- 3133
definite time, or when required, for your protection
against our long drawings, turn over or transfer
to you whatever securities there may happen to be
in the "escrow" after such changes as we may
have made therein."

The agreement was such a "general, indefinite
promise" that it must be "disregarded" when, as
here, the rights of the general creditors intervene.

The question arises, What are the rights of the
general creditors? I think the opinion of the Cir-
cuit Court of Appeals in the Eighth Circuit in the
matter of the Great Western Manufacturing Com-
pany, 18 Bankruptcy Reports, 259, furnishes an an- 3134
swer to the question. At page 263, the Court says:

"But the theory and purpose of the Bank-
ruptcy Act were to distribute the unexempt
property which the bankrupt owned four
months before the filing of the petition in
bankruptcy against him, share and share
alike, among his creditors of the same class.
To this end every judgment procured or suffer-
ed against him, every transfer by an in-
solvent of any of his property, every con-
ceivable way of depleting it after the com-
mencement of the four months the effect of
which is "to enable any one of his creditors 3135
to obtain a greater percentage of his debt
than any other of such creditors of the same
class," is declared to be a voidable preference
if the creditor has reason to believe that a
preference is intended thereby. * * *

"When the agreement is made before, and
the mortgage or transfer within, the four
months, the title stands unincumbered by
the latter at the commencement of the four
months, and the proceeds of that title are
pledged under the bankruptcy law for the
benefit of all the creditors *pro rata*. Any

- 3136 subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or transfer should be adjudged voidable if it is otherwise so, and that the mortgagee or transferee should be remitted to his original agreement. In this way the property at the commencement of the four months and its value may be preserved for the general creditors and the mortgagee or transferee may retain every lawful advantage his earlier contract confers upon him.
- 3137 Any other course of decision opens a new and enticing way to secure preference, nullifies every provision of the law to prevent them, and invites fraud and perjury."

This case illustrates the rule in *Lowell on Bankruptcy* set forth *supra*. The Royston Milling Company, a corporation, was adjudicated a bankrupt on January 6th, 1905. Prior to September 6th, 1904, the Great Western Manufacturing Company had sold, installed and put in operation in the Royston Company's mill certain machinery and material for which the Royston Company gave its promissory notes for some Ten thousand dollars

3138 "and an agreement that the title and the right to the possession of the machinery and material should remain in the vendor until the notes were paid, notwithstanding any agreement or security that was or might be taken for the performance of the agreement, and that the payment of the notes should be secured by a mortgage on the mill and its appurtenances, or equivalent security, at the election of the Great Western Company."

This agreement was first filed in the proper county clerk's office within the four months' period prior to the bankruptcy, to wit, on October 8, 1904,

and on October 10, 1904, the Royston Company³¹³⁹ (the bankrupt) made a mortgage on the mill and its appurtenances, which was recorded in the office of the Register of the proper county on the same day. The District Court held that the agreement was valid and the mortgage a voidable preference, and the Circuit Court of Appeals affirmed the District Court.

In respect to the machinery and material sold, the decision held that there was a *bona fide* engagement "amounting to an equitable lien," and hence valid, inasmuch as a contract of conditional sale whereby the parties agreed that the title should remain in the vendor until the purchase price was³¹⁴⁰ fully paid was voidable under the statutes of Nebraska by purchasers, attaching creditors and judgment creditors only if not filed in the office of the county clerk, and hence was valid against all other creditors, though unfiled, and therefore against the trustee in bankruptcy, who represented no attaching or judgment creditors.

In this case, the contract of conditional sale created a lien at the time the contract was made, but the agreement that the payment of the notes given for the machinery and material furnished "should be secured by a mortgage on the mill and its appurtenances or equivalent security" did not³¹⁴¹ create a lien as of the date of the agreement was made but amounted to no more than a promise "or a general covenant for further security," and, in the language of Lowell on Bankruptcy, *supra*, would not "authorize the debtor to give and the creditor to receive security under circumstances which would make it a preference."

So, in the case at bar, no lien upon the escrow was created at the time the agreement was made. There was merely an agreement or promise that a lien should be created by the delivery of the escrow (*i. e.*, of the securities then constituting the escrow)

3142 to the pledgee when required for its protection. Such transfer was made within the four months—in fact, within a few days—of the bankruptcy. The Court in the Great Western Manufacturing Company case held that such a transfer, “which otherwise constitutes a voidable preference, is not deprived of that character or validated by the fact that it was executed in the performance of the contract to do so made more than four months before the filing of the petition.

The cases of *Casey v. Cavaroe*, same *v. National Park Bank*, and same *v. Schuchardt* 96 U. S. Sup. Ct., 467, 492, 494, are cases which have a distinct
3143 bearing upon the question of law here involved. The Court there held that possession is of the essence of a pledge, and without it no privilege can exist as against third persons, and, further, that where it was agreed that a bank should deposit bills and notes with its president and his partner, by way of pledge to secure a loan made by a third party, and the president delivers them back to the bank officers for collection, with power to substitute other securities therefor, it is not such a delivery and possession as is necessary to create a privilege by the law of Louisiana.

The particular provision of the Law of Louisiana involved was this: “That where a debtor wishes to
3144 pawn promissory notes, bills of exchange, stocks, obligations or claims upon other persons, he shall deliver to the creditors the notes, bills of exchange, certificates of stock or other evidences of the claims or rights so pawned, and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof, if made in good faith.”

The plaintiff in that case was the Receiver of the debtor bank. At or about the time of the failure of the bank, the president took the bills and securities and delivered the same to his firm of C.

Cavaroc & Son, who claimed to hold them as agents ³¹⁴⁵ for the Societe de Credit Mobilier of Paris by way of pledge to secure said Societe for certain acceptances of bills drawn by the bank in the July previous. The plaintiff, the receiver, sued, claiming that the transfer was void under the provision of Section 5242 of the National Banking Act. That section is as follows:

"All transfers of the notes, bonds, bills of exchange or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, securities on real estate or of judgments or decrees in its favor; all de- ³¹⁴⁶posits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor over another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against ³¹⁴⁷ such association or its property before final judgment in any suit, action or proceeding, in any state, county or municipal court."

The actual transfer of the securities was made "after the commission of an act of insolvency, or in contemplation thereof," and the plaintiff alleged that the transfer was made with a view to the preference of one creditor to another. The Court takes up and considers the proposition that the receiver stood merely in the shoes of the debtor

3148 bank and had no greater rights than the bank could have had, and says:

“Indeed, it may be laid down as a general rule, as well at the common law as the civil law, that a trustee, assignee or syndie, having the powers and occupying the relations which are sustained by a Receiver under the National Banking Act, or an assignee in bankruptcy, may well oppose any privilege or preference which the law itself, unaided by a *bona fide* purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference; even though the debtor himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim. That an assignee in bankruptcy has this power cannot well be doubted; and since a national bank cannot be put into bankruptcy, but can only be wound up under the peculiar provisions of the Banking act, the receiver appointed by virtue thereof must have the same power; or the absurd consequence would follow, that the property of a bank disposed of by voluntary conveyances, or Pledges not good as to third persons, would be beyond the reach of creditors.

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“Where the legal or equitable property in a security passes, and there is no express law invalidating the transfer, the creditor will be entitled to hold it as well against the assignee or receiver as against the debtor; because the assignee only takes such title as the debtor has at the time of the assignment or insolvency. In that case, however, the question of fraud would be admissible as a question of fact, to invalidate

the transaction. But, in the present case, 3151
 that question does not arise; or, if it might
 be raised, it is immaterial. The Credit
 Mobilier claims a privilege by virtue of a
 pledge; and such a privilege, as we have
 seen, cannot be maintained as to third per-
 sons, without possession. Bad faith, it is
 true, would defeat the pledge though the
 creditor had possession. But want of pos-
 session is equally fatal, though the parties
 may have acted in good faith. Both are
 necessary to constitute a good pledge so as
 to raise a privilege against third persons.
 The requirement of possession is an inex- 3152
 orable rule of law, adopted to prevent fraud
 and deception; for, if the debtor remains in
 possession, the law presumes that those who
 deal with him do so on the faith of his be-
 ing the unqualified owner of the goods.

“This consideration meets the objection
 which is urged against the rule, that it would
 result in giving to the general creditors the
 benefit of the advances made to the debtor
 on the faith of the stipulated pledge, inas-
 much as the estate is increased to the extent
 of these advances. It is true that the estate
 is so increased; but the debts and liabilities 3153
 are also increased to the same amount by the
 demand of the party who makes the ad-
 vances; the only effect of the rule being,
 that the latter comes into concurrence with
 the other creditors on an equality, and not
 by way of preference; and if the latter de-
 rive any benefit from this result, it must be
 remembered that, in the view of the law,
 they might not have given credit to the com-
 mon debtor had he not remained in posses-
 sion of the goods, and appeared to continue
 as the absolute owner thereof. If the

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pledge should be sustained, they would have good cause to complain that they had been deceived by the note of the parties setting up the pledge. So that, on the question of relative merit and demerit, the parties are in all respects equal. It is on this principle that the law is founded.

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"These considerations also supply an answer to another suggestion, that equity will consider as done what the parties intended should be done, which it is assumed was, in this case, a transfer of the title of the securities. Equity will not exercise this power when it would injure third persons who have incurred detriment, and acquired consequent rights by the acts that are done. Such detriment has, in view of the law been incurred in this case, and such rights have, by the express letter of the law, accrued.

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"The suggestion may also be answered by the fact that it cannot be truly said to have been the intent of the parties to transfer the title. The agreement was only that 'securities of the first class shall be deposited with the firm of Messrs. Cavaroc & Son.' A transfer of the title would have been inconsistent with that unrestricted control over the securities which the bank desired to, and did, retain, and which must be considered as having been assented to by the Credit Mobilier, through the common agent, Cavaroc.

"On this ground, therefore, of want of possession in the pledgee, or of a third person agreed upon by the Parties; and of actual possession and control in the pledger, we feel compelled to hold that the Credit Mobilier had no privilege as to third persons, and that the receiver was entitled to the securities in question."

The facts in the case of *Casey v. National Park Bank* 3157 were as follows:

On or about the 4th of June, 1873, E. H. Reynes, on behalf of the New Orleans National Banking Association, applied to the National Park Bank of New York for a loan of \$150,000, upon the notes of the former, to be secured by a pledge of collaterals. On the 11th of June, the President of the Park Bank, at New York, addressed a letter to Charles Cavaroc, President of the New Orleans National Banking Association, in which he says: "Mr. E. H. Reynes has made an application for a loan to the N. O. National Banking Assn., to be secured by the bills receivable of the Bank. We will loan you \$75,000, payable October 10th, and \$75,000, payable October 20th next. As collateral to these notes, select \$170,000 of your bills receivable of best known names; retain them as deposited by us, sending us a schedule and receipt for them—as held in trust for us and subject to our order." 1358 On the 11th of June, Cavaroc, as President of the New Orleans Bank, sent to the Park Bank, in a letter, two notes of the former for \$75,000, each payable as agreed, and a list of notes and bills receivable, amounting to about \$170,000, with a receipt appended thereto as follows:

"NEW ORLEANS, June 11, 1873. 3159

"Received, in trust, for account of the National Park Bank of New York, from the New Orleans National Banking Association, \$170,084.42, of bills receivable described in annexed statement; said bills receivable being given by the New Orleans National Banking Association, as collateral security of their notes, due respectively on the 10th and 20th of October next, 1873, each for the sum of \$75,000, payable to the order of the National Park Bank of New York.

"C. CAVAROC, President."

3160 In the letter in which these papers were enclosed, Cavaroc, after referring to the two notes, says: "I further enclose statement of \$170,084.42 of bills receivable, held in trust and as collateral security for the punctual payment of the obligations of the bank, with a receipt for the same. As fast as the bills receivable will mature and be paid, I beg the privilege of substituting new collaterals, of which due notice will be given you." The Park Bank, in a letter of June 17th, assented to this request, as follows: "You can make the change of collaterals you mention, advising us of the same, and that you hold the new paper the same as the old, viz.: in trust." 3161 Thereupon the two notes were discounted, and the Bank of New Orleans drew the money therefor.

The bills receivable, specified in the list referred to, were placed in an envelope by the note clerk, handed to Cavaroc, and by him handed to the cashier, who, for a while, kept them in the safe, but afterwards delivered them back to the note clerk for convenience of collecting and renewing those which matured. The same substitutions of particular notes and bills were made from time to time, as was done in case of the Societe de Credit Mobilier, new lists were made, and finally they 3162 were delivered to Cavaroc after the failure of the Bank, who handed them to E. H. Reynes & Co., to keep for the Park Bank of New York.

The bills were never removed from the Bank, and were never indorsed by it, until the bank failed; and were always kept on the portfolio of bills receivable, without any entry on the books or in the reports to show that they had been pledged.

The point in the decision is that there was no such possession by or on behalf of the Park Bank as would constitute a valid pledge as to third persons.

This principle of law, that to make a valid pledge

there must be possession in the pledgee, is not peculiar to the law of Louisiana. It is a general principle of law, and it is the law of the State of New York. 3163

In a late case in the United States Supreme Court, *Security Warehousing Company vs. Hand*, 206 U. S., 415-427, which involved the rights of trustees in bankruptcy against creditors claiming liens on merchandise as security for advances made, the Supreme Court, Mr. Justice Peckham delivering the opinion, states the rule as follows:

"The general law of pledge requires possession, and it cannot exist without it" (citing *Casey vs. Cavaroe, supra*). 3164

In *Ryttenberg v. Schafer*, 11 American Bankruptcy Reports, 664, in this District, Judge Holt, after stating that the lien of a pledge depended upon possession, actual or constructive, held in that case that an equitable lien could not be maintained because there was no specific agreement therefor. Judge Holt there remarks:

"The simple fact in the case is that Raden & Co. wanted to obtain advances without delivering possession of the property, and Schafer, Schramm & Vogel wanted to acquire a lien without taking possession of the property. It was one of the numerous attempts to give a lien, by owners of property while retaining the apparent ownership of it. The law denies any validity to such arrangement whenever bankruptcy occurs and the rights of general creditors are involved." 3165

The Court of Appeals in the late case of *Buffalo German Insurance Company vs. Third National Bank*, 162 N. Y., 170, thus states the rule:

"Possession is of the essence of the pledge, in order to raise a privilege against third

3166 persons" (citing *Casey vs. Cavaroc*, 96 U. S., 467, and *Wilson vs. Little*, 2 N. Y., 443).

The decision of the United States District Court for the District of Massachusetts, in the case of *Wood vs. U. S. Fidelity & Guaranty Company*, 16 American Bankruptcy Reports, 21, cited by the counsel for the defendant, if inconsistent with the decision in the matter of *Great Western Manufacturing Company*, cited above, must be overruled by the latter decision, which is a subsequent decision by the United States Circuit Court of Appeals in the Eighth Circuit. Further, the *Wood* case is distinguishable from the case at bar in the nature of the language used, which was held to have created a lien as against the trustee in bankruptcy. In the *Wood* case the language used was:

"We do further agree in the event of our being unable to complete or carry on the aforesaid contract, to assign, and we do hereby assign such plant as we may own or have upon said work to the said United States Fidelity & Guaranty Company."

There is no such language in the case at bar.

3168 The special "escrow" of August 27th, 1907, was not created or set apart until that time, and therefore the original agreement, as well as the transfer of these particular securities, was made within the four months' period.

Counsel for defendant contends that the net result of the dealings during the four months was an increase in the assets; that such assets "was increased by the sale of defendant's acceptances." The "*acceptances*" were not sold; the drafts were sold and the money received therefore *before* they were accepted.

If the drafts had not been accepted, the purchasers would have had a claim for the amount thereof

against the drawers alone; if the drafts had been paid, as well as accepted, then defendant, and not the purchasers, would have had a claim against the drawers for the amount thereof; and in either case the liability or debt of the drawers would have been increased by the same amount. 3169

In my opinion Kessler & Company, Limited, and its liquidator have no title to or lien upon the securities called the "Special Escrow of August, 1907." It follows that Messrs. J. & P. Coats, Limited, the intervening creditors, have no rights in the premises and are entitled to no remedy herein.

My conclusion is that the Trustee is entitled to both the ownership and possession of all the securities mentioned constituting the "escrow," with the exception of the 1,606 shares of United Lighting & Heating Company stock, which stock, since the month of January, 1904, has been in the possession of Kessler & Company, Limited, and that Lawrence E. Sexton, as Trustee of the bankrupts, is entitled to an order or decree accordingly. 3170

With respect to the compensation of the Master, I respectfully submit that this is a difficult or extraordinary case within the meaning of Rule 16 of the Court. I further certify that there is an unpaid stenographer's bill amounting to the sum of \$148. 3171

All of which is respectfully submitted.

Dated New York, April 30, 1908.

(Sgd.) PETER B. OLNEY,

Master.

(Endorsed)—Report and Opinion of Master.—

Filed May 4, 1908.

3172 DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

3173 LAWRENCE E. SEXTON, as
 Trustee in Bankruptcy of
 Alfred Kessler, Rudolf E. F.
 Flinsch and William K.
 Gillett, composing the firm
 of Kessler & Company, and
 the said KESSLER & COM-
 PANY, Bankrupts,
 Complainant,

 AGAINST

 KESSLER & COMPANY,
 LIMITED,
 Defendant.

3174 Exceptions taken by the defendant and by Frank
 Youatt, Esquire, as Liquidator of Kessler & Com-
 pany, Limited, to the instrument purporting to be
 a report heretofore filed herein, in the office of the
 Clerk of the District Court of the United States
 for the Southern District of New York, by Peter
 B. Olney, Esquire, as Special Master in Chancery,
 to whom this case was referred as such Master
 to take the testimony in this case and to report the
 same to this Court with his opinion.

FIRST EXCEPTION.—Defendant excepts to the
 finding of fact numbered "Second," and more es-
 pecially to that portion thereof which finds that
 the defendant had a branch office in New York.
 As ground of exception defendant alleges that there

is no evidence in the case to sustain such finding ³¹⁷⁵
of the Master.

SECOND EXCEPTION.—Defendant excepts to the finding of fact numbered "Sixth," and more especially to that portion which finds that "in no case does it appear that Kessler & Company of Manchester objected to any of the changes made." As ground of exception defendant alleges that said finding is irrelevant and immaterial and that the correspondence (Defendant's Exhibit A) shows that at all times subsequent to the original deposit of the securities in June, 1903, changes were immediately reported to the defendant, and complete ³¹⁷⁶ and detailed report made as to the value and character of all securities which were deposited in place of those taken out and that the defendant exercised the closest and most careful scrutiny over said charges.

THIRD EXCEPTION.—Defendant excepts to the finding of fact numbered "Seventh," and more especially to that portion thereof which finds that "Kessler & Company of New York in a memorandum book, which was called the Loan Book, made certain entries relative to these transactions." As ground of exception defendant alleges that there is ³¹⁷⁷ no evidence in the case to sustain the finding that this was a memorandum book, but that the testimony of William E. Magie, the Cashier of Kessler & Company of New York, shows that the books which were kept by him as Cashier in which were entered a record of securities were called "Owners of stocks and Bonds," "Stocks", "Bonds", and the Loan Book, and that the Loan Book was the book which contained a record of securities for loans made by Kessler & Company of New York, and that the entries in this loan book were made by him or under his direction, were correctly made at the time

- 3178 he made them, were made in the regular course of business, and were correct when they were made, and that these securities were properly entered in the said Loan Book as securities which had been deposited as collateral for a loan from Kessler & Company, Limited of Manchester, England, and that the said William E. Magie was continuously from June, 1903, down to October 25th, 1907, the custodian of all the stocks, bonds, notes and other securities, and that the aforesaid books were the proper records kept by him in the regular course of his business which showed the person or persons to whom the said securities belonged and the
- 3179 place and manner in which they were deposited; that the entries in said Loan Book clearly showed that these securities were the property of the defendant and were no part of the available assets of the bankrupts and could not be used by the bankrupts either as a basis of credit or in the ordinary course of their business.

FOURTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Eighth," and more especially to that portion thereof which finds that Kessler & Company of New York did withdraw certain of the securities from the "Special escrow" and substituted others in their place and that on

3180 the 20th day of September, 1907, the 27th day of September, 1907, and the 10th day of October, 1907, certain specified securities were so withdrawn. As ground of exception defendant alleges that said finding is irrelevant and immaterial and it appears as part of the same finding that no permission or authority was given by the defendant to Kessler & Company of New York to withdraw any of these securities and substitute other securities therefor.

FIFTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Ninth," and more

especially to that portion thereof which is con-3181
tained in the first two paragraphs thereof and
which finds in effect that Henry Kessler upon his
arrival in New York on October 4th, 1907, visited
the office of Kessler & Company of New York on
October 5th, 1907, and on October 7th, 1907, and
then went to Philadelphia on October 8th, 1907,
and then went to Atlantic City, and returned to
New York on the 21st of October, 1907, and that
certain communications from the Manchester
Company were forwarded by Kessler & Company
of New York to Mr. Henry Kessler and received
by him during his absence from the City, and that
on October 21st, 1907, Alfred Kessler and his wife 3182
dined with Henry Kessler at the latter's hotel, and
that on October 22nd, 1907, Henry Kessler visited
the office of Kessler & Company of Wall Street,
and that on October 22nd, 1907, the Knickerbocker
Trust Company closed its doors, and the acute
financial panic began and continued during the
rest of that week and the following week and for
sometime thereafter, and that Henry Kessler re-
mained in New York during the week ending Sat-
urday the 26th of October, with the exception of
a visit to Philadelphia on the 23d and that on the
24th and 25th of October he visited the office of
Kessler & Company, and that on October 23rd, 3183
1907, the run was begun upon the Trust Company
of America, whose offices are at No. 37 Wall Street,
which run persisted for many days, and that for
several days Wall Street was crowded with de-
positors seeking to withdraw their deposits, and
that there was great excitement in the Stock Ex-
change, and that rates for money were quoted at
115, and that unlisted securities and securities
other than first class securities could not be sold
at any price. As ground of exception the defend-
ant alleges that said finding is incompetent, irrel-
evant and immaterial, and has no bearing on any

9184 issue in this case, and there is no evidence in this case that Henry Kessler at or prior to the time when he took possession of the securities on the 25th day of October, 1907, had reasonable cause to believe that Kessler & Company of New York were insolvent, but on the contrary their books of account show them to be solvent and no member, employee or creditor of the said firm believed them to be otherwise nor had the said firm ever up to that time defaulted in any of its payments nor given the slightest indication of its inability to meet its obligations in full as they became due.

3185 SIXTH EXCEPTION.—Defendant excepts to the finding of fact numbered “Tenth.” As ground of exception defendant alleges that said finding is incompetent, irrelevant and immaterial and relates solely to matters which happened subsequent to the 25th day of October, 1907, when Henry Kessler took possession of the securities.

SEVENTH EXCEPTION.—Defendant excepts to the finding of fact numbered “Eleventh.” As ground of exception defendant alleges that said finding is incompetent, irrelevant and immaterial and that matters therein referred to happened subsequently to the time when Henry Kessler took possession of the securities.
3186

EIGHTH EXCEPTION.—Defendant excepts to the finding of fact numbered “Thirteenth.” As ground of exception defendant alleges that said finding is incompetent, irrelevant and immaterial and that said cablegram was sent subsequent to the time when Henry Kessler took possession of the securities.

NINTH EXCEPTION.—Defendant excepts to the finding of fact numbered “Fourteenth.” As ground

of exception defendant alleges that said finding is 3187 incompetent, irrelevant and immaterial and that the letter therein referred to is no evidence of the insolvency of Kessler & Company of New York, and no evidence that a preference was intended and no evidence that the said defendant had reasonable cause to believe either that Kessler & Company of New York were insolvent or that a preference was intended, and that said letter was written subsequent to the time when Henry Kessler took possession of the securities.

TENTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Fifteenth." As ground 3188 of exception defendant alleges that said finding is incompetent, irrelevant and immaterial and that the cablegram therein referred to as having been received by Henry Kessler from P. W. Kessler, as explained by the testimony of Rudolf E. F. Flinsch as to the latter's conversation with P. W. Kessler on October 7th, and as reported by the said Flinsch in his letter to Alfred Kessler dated October 8th, 1907, is no evidence either of the insolvency of Kessler & Company of New York or that the defendant had reasonable cause to believe them insolvent, or that the defendant had reasonable cause to believe that a preference was 3189 intended on October 25th, 1907, and has no bearing on any issue in this case; and that the letter dated October 8th, 1907, from Alfred Kessler to Flinsch is incompetent, irrelevant and immaterial, is not binding upon this defendant, was not shown to have been communicated to this defendant and was not admissible as evidence of insolvency.

ELEVENTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Sixteenth." As ground of exception defendant alleges that the portion of said finding contained in the first para-

- 3190 graph thereof is incompetent, irrelevant and immaterial and that there is no evidence in this case to show that said letter had been received by Henry Kessler at the time he took the securities, but on the contrary the evidence shows that possession of the securities was taken under the direction and advice of defendant's lawyers, which was given on October 24th, 1907. As further ground of exception defendant alleges that the cablegram referred to in said finding was incompetent, irrelevant and immaterial, not binding upon this defendant and there is no proof that this defendant knew the contents of said cablegram. As further ground of exception
- 3191 defendant alleges that the portion of said finding which is in effect that Henry Kessler was informed on October 25th that Alfred Kessler had cabled abroad for \$200,000, and that Henry Kessler was informed of the contents of said cable to the effect that Kessler & Company required One Million Marks by October 28th, is incompetent, irrelevant and immaterial, and that such information was received by Henry Kessler subsequent to the time when he took possession of the securities, and the securities were taken under the direction and advice of defendant's lawyers given the day before said cablegram was sent.

- 3192 TWELFTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Seventeenth." As ground of exception defendant alleges that there is no evidence in this case to support such finding and further that said finding is incompetent, irrelevant and immaterial and has no bearing on any issue in this case, and further that said letter was written subsequent to the time when possession of the securities was taken by defendant and more than a day after defendant's lawyers had directed and advised taking the same.

THIRTEENTH EXCEPTION.—Defendant excepts to 3193
the finding of fact numbered "Eighteenth." As
ground of exception defendant alleges that said
finding is incompetent, irrelevant and immaterial.
The cablegrams referred to having been sent on
October 29th and 30th, respectively, which was
subsequent to the time when Henry Kessler took
possession of the securities and which was at or
subsequent to the time when Kessler & Company
of New York had decided to make a general as-
signment for the benefit of creditors.

FOURTEENTH EXCEPTION.—Defendant excepts to
the finding of fact numbered "Nineteenth." As
ground of exception, defendant alleges that said 3194
finding is incompetent, irrevelant and immaterial,
no proof of actual insolvency of Kessler & Company
of New York, under the definition of the Bank-
ruptcy Act having been offered, and the said state-
ments and said findings are no proof of such insol-
vency, and are circumstances that might be en-
titled to consideration only after proper evidence
of such insolvency had been received.

FIFTEENTH EXCEPTION.—Defendant excepts to
the finding of fact numbered "Twentieth," except
the last sentence of the first paragraph thereof.
As ground of exception defendant alleges that said 3195
finding is incompetent, irrelevant and immaterial,
and that the bankrupts were not shown to have
been insolvent under the definition of the Bank-
ruptcy Act on the 25th of October, 1907, and noth-
ing contained in said finding shows them to have
been insolvent on that day or at any other time,
and that the petition in involuntary bankruptcy
referred to therein alleged as the sole act of bank-
ruptcy the making of the general assignment for
the benefit of creditors on October 30, 1907, and
the adjudication in bankruptcy which was had
thereunder is no evidence of insolvency.

3196 **SIXTEENTH EXCEPTION.**—Defendant excepts to the finding of fact numbered “Twenty-first.” As ground of exception defendant alleges that said finding is incompetent, irrelevant and immaterial, that it is objectionable on the ground that it is too general and merely a review of portions of the evidence, that the statements of Flinsch to the creditor who had obtained a verdict, and to his partner, and his activities while in Europe, if of any importance, are not binding upon this defendant, are no proof of insolvency, and are not admissible to prove insolvency until proper foundation therefor has been made by the direct proof of insolvency under the definition of the Bankruptcy Act which
3197 the law requires.

SEVENTEENTH EXCEPTION.—Defendant excepts to the finding of fact numbered “Twenty-second.” As ground of exception, defendant alleges that the first portion thereof which finds in effect that part of the bankrupts’ business was that of financing the business of the dry goods firm of Milne, Turnbull & Company, and that the business of the latter firm was in an unsatisfactory condition and that Flinsch in one letter urged the sale of the stock of goods at any price and that Flinsch in the course of his correspondence with Alfred Kessler suggested
3198 that the latter call in outstanding accounts receivable, is incompetent, irrelevant and immaterial, and is no proof and not admissible as evidence of the insolvency of Kessler & Company of New York on the 25th day of October, 1907, or at any other time. As further ground of exception defendant alleges that the remaining portion of said finding which relates to the interview between P. W. Kessler and Flinsch at Manchester on October 17th, is objectionable because argumentative, that the testimony of Rudolf E. F. Flinsch, and the letter dated October 8th, 1907, from Flinsch to Alfred Kessler

(Receiver's Exhibit 37, S. M., 1024) shows pre- 3199
 cisely what was discussed at this interview, and
 there is no evidence to contradict this testimony
 and letter, and that without proper proof of the in-
 solvency of said Kessler & Company of New York
 on the 25th day of October, 1907, said finding is
 immaterial.

EIGHTEENTH EXCEPTION.—Defendant excepts to
 the finding of fact numbered "Twenty-third." As
 ground of exception defendant alleges that there is
 no evidence in the case to sustain such finding or
 conclusion of the Master, and that the correspond-
 ence referred to in said finding was private, per- 3200
 sonal and confidential correspondence between Al-
 fred Kessler and his brother P. W. Kessler, and
 that said correspondence is very voluminous and
 said finding is improper in that it sets forth
 selected portions or extracts of certain letters and
 not the entire letters and said portions to which the
 Master refers in this finding do not show that the
 defendant was posted from time to time as to the
 financial condition of the New York firm and there
 is nothing contained in these letters upon which a
 reasonable man would base a belief that Kessler &
 Company of New York were insolvent on October
 25th, 1907, and that said finding is incompetent, ir- 3201
 relevant and immaterial.

NINETEENTH EXCEPTION.—Defendant excepts to
 the findings of fact numbered "Twenty-fourth,"
 "Twenty-fifth" and "Twenty-sixth." As ground of
 exception defendant alleges that said findings are
 each of them incompetent, irrelevant and imma-
 terial.

TWENTIETH EXCEPTION.—Defendant excepts to
 the finding of fact numbered "Twenty-seventh."
 As ground of exception defendant alleges that said

3202 finding is incompetent, irrelevant and immaterial,
 and that the transactions stated in said finding
 were in no manner inconsistent with defendant's
 title and as a further ground of exception that
 there is no evidence in the case to sustain the find-
 ing in effect that where any part of the principal
 of a note was paid off, Kessler & Company of New
 York never at any time accounted to defendant and
 that the correspondence (Defendant's Exhibit A)
 shows that whenever any of the securities were sold
 or payments made on account of the principal such
 sale or payment was immediately reported by Kess-
 ler & Company of New York to the defendant and
 3203 other securities of equal value were substituted at
 the time said payments were made or securities re-
 moved, all of which were subject to the approval
 of the defendant, and that during the entire period
 from June 30, 1903, down to October 25th, 1907,
 Kessler & Company of New York accounted at
 regular intervals to the defendant and rendered
 full and detailed reports without delay of all
 changes in the securities and the amount and value
 of said securities was never at any time depleted.

TWENTY-FIRST EXCEPTION.—Defendant excepts
 to the finding of fact numbered "Twenty-eighth."
 3204 As ground of exception defendant alleges that said
 finding is incompetent, irrelevant and immaterial
 for the reason that the bankrupts herein were a co-
 partnership, consisting of three individuals, that
 the petition in bankruptcy was filed both against
 the individual members and against the co-partner-
 ship, that there is no evidence in this case as to the
 value of the assets and property of the individual
 members of the said co-partnership or any of them
 and that the schedules in bankruptcy of the co-
 partnership, taken alone, are not proof of in-
 solvency within the meaning of the Bankruptcy
 Act on the 25th day of October, 1907, nor at any

other time. As further ground of exception, de- 3205
 fendant alleges that the finding from the testimony
 of one of the appraisers appointed herein that the
 value of the securities in said escrow would not
 probably exceed the sum of \$257,495.00, including
 the value of the securities in the "special escrow,"
 is incompetent, irrelevant and immaterial for the
 reason that the testimony of said appraiser clearly
 shows that most of the securities in question were
 securities carried by the bankrupts as managers of
 syndicates and were securities the value of which
 would be greatly affected by suspension and failure
 of the bankrupts and the valuation placed by the
 said appraiser upon these securities was based 3206
 upon the fact that the bankrupts had suspended
 and failed. As further ground of exception, de-
 fendant alleges that the finding that the valuation
 placed upon certain assets is probably greatly in
 excess of the value of the securities for the reason
 that at the time of the failure the collateral con-
 sisted of stocks that could only be sold at a great
 sacrifice, is objectionable because it is argumenta-
 tive, and that the fact that the securities could only
 be sold at a great sacrifice at the time of the fail-
 ure, when, as found by the Master, all unlisted se-
 curities were practically unsalable, was no indica-
 tion of their value and is immaterial. As further 3207
 ground of exception defendant alleges that the find-
 ing that the estimated value of the collateral for
 debts due on open account in the sum of \$998,601.03
 is \$788,420.36, is incompetent, irrelevant and im-
 material, and that the estimated value of the col-
 lateral deposited for the debts due on open account
 is not the value of such debts. As further ground
 of exception, defendant alleges that the finding that
 an involuntary petition in bankruptcy was filed
 against Milne, Turnbull & Company on November
 13th, 1907, is incompetent, irrelevant and imma-
 terial, for the reason that said involuntary petition

3208 was subsequent to the 25th day of October, 1907, and does not indicate the value of the assets of the bankrupts on the date last mentioned, but on the contrary it may be inferred that the failure of Milne, Turnbull & Company was caused by the prior failure of these bankrupts who were the bankers of Milne, Turnbull & Company.

TWENTY-SECOND EXCEPTION.—Defendant excepts to the finding of fact in said report numbered “Twenty-ninth.” As grounds of exception defendant alleges that said finding is incomplete and inaccurate and not a full and correct statement of
3209 the undisputed facts established by the evidence, to-wit: that on the 13th day of July, 1907, and at various dates down to and including the 25th of October, 1907, drafts in the aggregate amount of over \$380,000 were drawn by the bankrupts upon the defendant and sold by the defendant for cash for the face amount, less the discount, and were thereafter all of them duly accepted by defendant, and that one of the said drafts to the amount of £5,000 was so accepted by the defendant on the 25th day of October, 1907, the day on which possession of the collateral was taken and that the defendant went into liquidation only subsequent to the time
3210 when these drafts began to mature and subsequent to the time when the petition in bankruptcy was filed in this Court against Kessler & Company of New York and subsequent to the time when defendant was deprived of the use of its collateral under its contract for the purpose of meeting these drafts by the injunction of this Court; that the stipulation of the parties (S. M. Page 1218) shows that a dividend of 12½% had then been paid by the liquidator of the defendant on said acceptances. As further ground of exception defendant alleges that the finding that a dividend of 12% has been paid by the liquidator on said acceptances is immaterial for

the reason that it appears that all of said drafts³²¹¹ had been accepted by the defendant and that defendant was primarily liable upon them and that if defendant is solvent the said drafts would be paid in full out of its assets and that no evidence was taken or could have been taken in this case as to the solvency or otherwise of this defendant, and that the record in this case shows that the defendant is in voluntary liquidation and that Frank Youatt, Esquire, is the liquidator duly appointed for the benefit of the shareholders of the defendant.

TWENTY-THIRD EXCEPTION.—Defendant excepts to the finding of fact numbered "Thirtieth." As³²¹² ground of exception defendant alleges that there is no evidence in this case to support this finding, that the finding is a conclusion based on certain portions of the evidence and is contrary to evidence, against the weight of evidence, and contrary to law; that the books of account show the bankrupt to have been solvent on the 25th day of October, 1907; that the adjudication in bankruptcy herein is no evidence of insolvency for the reason that the only act of bankruptcy alleged in the petition was the making of a general assignment for the benefit of creditors by one of the partners on the 30th day of October, 1907; that the schedules of the individual partners were not offered in evidence and³²¹³ no evidence as to the assets and property of the individual partners was taken; that there is no evidence in the case as to the value of the assets of the bankrupt firm on the 25th day of October, 1907, when it was a going concern; that the value of a large part of its securities was directly and immediately affected by the suspension of the firm on the 30th day of October, 1907; that there is no evidence in this case that defendant had any knowledge of the value of the assets or of the amount of the liabilities of the bankrupts on the 25th day of

- 3214 October, 1907, or any means of knowledge of the same, or opportunity of acquiring the same; that on the contrary, Alfred Kessler, who was the partner in charge of the business of the bankrupts on October 25, 1907, testified that he believed that his firm was solvent on that day, and the testimony of Alfred Kessler, McLean, and Magie all shows that up to that time the firm had not only met all of its obligations, but that it had no trouble in selling all the exchange it needed to meet its maturing obligations, that the amount coming due during the following week was not large, that there was no apprehension or cause for apprehension on October
- 3215 25th, 1907, and that the immediate cause of the suspension was the failure to sell exchange, which occurred unexpectedly and for the first time, and on the 29th day of October, 1907; that the plaintiff has wholly failed with all the books and records of the bankrupts at his disposal, to furnish proof of the insolvency of the bankrupts on the 25th day of October, 1907, of the nature and quality which the law requires and relies wholly upon inference and conjecture; that not only is there no evidence in this case that the defendant had reasonable cause to believe that the bankrupts were insolvent on that day, but on the contrary the conduct of the defendant down to and including the 29th day of
- 3216 October, 1907, and its dealings with the bankrupts are wholly inconsistent with its knowledge of any facts which would lead a reasonable man to believe that the bankrupts were insolvent.

TWENTY-FOURTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Thirty-first." As ground of exception, defendant alleges that there is no evidence in this case to support such finding and that there was no transfer on the 25th day of October, 1907, and that there was no preference on that day and no intention to give a preference, and

that defendant did not have reasonable cause to ³²¹⁷ believe that any preference was intended when it took possession of its own property under its contract.

TWENTY-FIFTH EXCEPTION.—Defendant excepts to the finding of fact numbered "Thirty-second." As ground of exception defendant alleges that there is no evidence in the case to support the said finding, and that there was no transfer by the bankrupt to the defendant on October 25, 1907, and that if the transaction on that day constituted a transfer then it was a transfer under the contract under which the advances were made, and that the ³²¹⁸ amount of such advances within about ten weeks prior to October 25, 1907, were greatly in excess of the value of the said securities and that on the very day in question the defendant accepted a draft for £5000; that all of said acceptances, aggregating more than \$380,000, and made within ten weeks prior to October 25, 1907, were made under a contract with the bankrupts by which the defendant should be secured and protected by the transfer and deposit of these securities.

TWENTY-SIXTH EXCEPTION.—Defendant excepts to the following statement, conclusion of law or ³²¹⁹ alleged finding of fact in the Master's opinion: "The schedules of the bankrupt, as we see, show a deficit of over half a million." As ground of exception defendant alleges that the title under which the plaintiff sues shows that there are four bankrupts and that the schedules of only one of these bankrupts were produced in evidence and that there is no evidence in this case as to the value of the property and the assets of the individual members of the copartnership, and that the schedules of the bankrupt firm which were filed herein do not show a deficit of over half a million.

3220 **TWENTY-SEVENTH EXCEPTION.**—Defendant excepts to the statement in the Master's opinion as follows: "That a large portion of the assets of the bankrupt consisted of securities that were not listed on the stock exchange, and, at the date of the 25th of October, 1907, were practically unsalable." As ground of exception defendant alleges that this finding is immaterial, and that the fact that they were unsalable on that day, at the time of an acute financial panic, does not show that they were valueless, and the evidence of the appraiser referred to in the Master's Report shows that many of them were of very considerable value, even after the
 3221 failure and bankruptcy of the bankrupts.

TWENTY-EIGHTH EXCEPTION.—Defendant excepts to the statement or alleged finding of fact in said opinion as follows: "A consideration of all the evidence and circumstances in the case lead, it seems to me, to the inevitable conclusion that on the 25th day of October, 1907, the bankrupts were hopelessly insolvent." As ground of exception defendant refers to the exception to the finding of fact in said report numbered "Thirtieth."

TWENTY-NINTH EXCEPTION.—Defendant excepts
 3222 to the statement, conclusion of law or alleged finding of fact in said opinion as follows: "The property transferred may be recovered by the Trustee irrespective of the intent of the bankrupt in making the payment."

THIRTIETH EXCEPTION.—Defendant excepts to the statement in said opinion as follows: "If the effect of the transfer is to give one creditor a preference over another in the same class, or to enable such creditor to obtain a greater percentage of his debt than any other of such creditors of the same class, the transfer becomes voidable, if made within

the four months period, upon the adjudication in 3223
bankruptcy, and the Trustee can recover the prop-
erty transferred."

THIRTY-FIRST EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "I conclude, therefore, as a matter of fact, that Kessler & Company were insolvent on the 25th day of October, 1907, and that Kessler & Company, Limited, had reasonable cause to believe that a transfer on such day was intended to give it a preference, and that the effect of the preference was to enable it to obtain a greater percentage of its debt than any other creditors of the same class." 3224

THIRTY-SECOND EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "This agreement was prospective in its nature. It does not appear that at the time these securities were set aside there were any long drawings against which Kessler & Company, Limited, required or needed any protection. In fact, during the whole period from June 30th, 1903, down to October, 1907, it does not appear that these securities were needed for the protection of Kessler & Company, Limited."

3225

THIRTY-THIRD EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "The contention of the respondent that the agreement, as evidenced by these letters and the course of dealings between the parties, transferred the title to these securities to Kessler & Company, Limited, to hold the same in trust, first for their own protection and then for the benefit of Kessler & Company, of New York, seems to me to be without foundation. The language used in the letters by the parties and in the agreement of October 25th, and their course of dealing, do not indicate that

3226 such was the nature of the agreement. It is natural to suppose that, if the title to these securities had been transferred in trust for the purpose claimed, the parties would have expressed such intention in apt words; but no such words were used. On the contrary, the words used and the course of dealing whereby Kessler & Company, of New York, were at liberty to exchange securities when they saw fit, indicate that the title was to remain in Kessler & Company, of New York, and that the securities set aside should be for the protection of the Manchester Company when such protection should be required."

3227 THIRTY-FOURTH EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "The course of dealing whereby Kessler & Company from time to time, and at all times up to October, 1907, protected Kessler & Company, Limited, by other means than these securities, against their long drawings, indicates that these securities were not to be transferred to Kessler & Company, Limited, unless they were required for their protection."

3228 The letter of July 8th, and the certificate which, at the request of Kessler & Company, Limited, Kessler & Company gave on the 31st of December, 1903, show that the property was set aside to be collateral security when required."

THIRTY-FIFTH EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "The use of the word "escrow" has some significance. It indicates here an incomplete transaction. The language used in the letters and certificates and the course of dealing show an intention or promise on the part of Kessler & Company to make a valid pledge at some future time or when required for the protection of Kessler & Company,

Limited. The title to the securities did not pass ³²²⁹ to Kessler & Company, Limited, either in trust or otherwise.

THIRTY-SIXTH EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "At the time the promise was made, it can hardly be said to amount to an agreement 'to convey specific property,' for Kessler & Company, Limited, in their letter to Kessler & Company, of New York, dated July 8, 1903, say: 'If at any time you have an opportunity of realizing on these securities, or any part of them, you are at liberty to take them and to replace them by others of equal value, ³²³⁰ though in that case we should, of course, like to see better quality.' "

THIRTY-SEVENTH EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "The contingency whereby the escrow would be needed for the protection of the Manchester Company against the long drawings it evidently considered very remote."

THIRTY-EIGHTH EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "The promise, then, or agreement, ³²³¹ at the time it was made, was general and indefinite, both with respect to the time and also as to the subject matter of the promise. That is to say, the promise amounts to this: 'We will at some future, indefinite time, or when required, for your protection against our long drawings, turn over or transfer to you whatever securities there may happen to be in the escrow, after such changes as we may have made therein.'

"The agreement was such a 'general, indefinite' promise, that it must be 'disregarded' when, as here, the rights of the general creditors intervene."

3232 THIRTY-NINTH EXCEPTION.—Defendant excepts to the statement or conclusion of law in said opinion as follows: "So, in the case at bar, no lien upon the escrow was created at the time the agreement was made. There was merely an agreement or promise that a lien should be created by the delivery of the escrow (*i. e.*, of the securities then constituting the escrow) to the pledgee when required for its protection. Such transfer was made within the four months—in fact, within a few days—of the bankruptcy."

3233 FORTIETH EXCEPTION.—Defendant excepts to the alleged conclusion, or what purports to be a conclusion, in the said Report, as follows: "In my opinion, Kessler & Company, Limited, and its liquidator have no title to or lien upon the securities called the 'special escrow of August, 1907.'"

3234 FORTY-FIRST EXCEPTION.—Defendant excepts to the alleged conclusion, or what purports to be a conclusion, in said report as follows: "My conclusion is that the Trustee is entitled to both the ownership and possession of all the securities mentioned constituting the 'escrow,' with the exception of the 1606 shares of United Lighting and Heating Company stock, which stock since the month of January, 1904, has been in the possession of Kessler & Company, Limited, and that Lawrence E. Sexton, as Trustee of the bankrupts, is entitled to an order or decree accordingly," on the ground that it is contrary to the evidence, against the weight of evidence, contrary to law, and that the facts found by the Special Master in the said report and established by the evidence in this case show clearly that the Trustee is not entitled either to the ownership or to the possession of the said securities or any of them, unless or until he shall have paid the drafts which were drawn by the bankrupts and accepted by the

defendant pursuant to the terms of the contract between the parties, under which the said securities were deposited for defendant's protection. 3235

FORTY-SECOND EXCEPTION.—Defendant excepts generally to the whole report of the Master, and to the finding or conclusion that the defendant has neither the ownership of the said securities nor a valid lien upon the same for the amount of its acceptance good as against the plaintiff herein.

FORTY-THIRD EXCEPTION. — Defendant excepts generally to the whole report of the Master on the ground that it is bad in form in that it does not state separately the findings of fact and the conclusions of law, and that the findings of fact and conclusions of law are not in accordance with the evidence or in accordance with the law. 3236

Respectfully submitted,

McLAUGHLIN, RUSSELL, COE & SPRAGUE,

Attorneys for the Defendant.

Office and P. O. Address:

No. 165 Broadway,

Borough of Manhattan,

New York City.

ABRAM I. ELKUS, Esquire,

FREDERICK C. McLAUGHLIN, Esquire,

3237

RUFUS W. SPRAGUE, JR., Esquire,

Of Counsel.

(Endorsed)—Bill of Exceptions. Filed June 3rd,
1908.

3238

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy, of Kessler & Company,

Plaintiff.

AGAINST

J. & P. COATS, LTD., impleaded with KESSLER & COMPANY, Ltd.,

Defendant.

In Equity.

3239

And now comes J. & P. Coats, Ltd., and files its exceptions to the report of Peter B. Olney, Esq., Special Master herein.

FIRST.—It excepts to the finding that in creating the "special escrow" of August 27th, 1907, Kessler & Company did not intend to create a present lien upon and to personally hypothecate the securities and substituted securities covered by said "escrow."

3240

SECOND.—It excepts to the finding that actual delivery to Kessler & Company, Ltd., by Kessler & Company or any other or different delivery from that found to have been made on or about August 7th, 1907, of the securities covered by the "special escrow" of that date, or that any other or different delivery than was subsequently made of the respective securities substituted for certain securities originally part of said "special escrow" was necessary in order to entitle Kessler & Company, Ltd., to a valid lien of said securities.

THIRD.—It excepts to the finding that the delivery to and possession of Kessler & Company, Ltd., on October 25th, 1907, of the securities then covered by said "special escrow" constituted an unlawful preference in favor of the latter. 3241

FOURTH.—That Kessler & Company have no title to or lien upon the securities covered by the "special escrow" of August 27th, 1907, and which securities were delivered into the actual possession of Kessler & Company, Ltd., on October 25th, 1907, and that J. & P. Coats, Limited, are not subrogated to the rights of Kessler & Company, Ltd.

FIFTH.—That the plaintiff is entitled to the unqualified ownership and possession of the securities covered by said "special escrow" free from any lien thereon in favor of Kessler & Company, Ltd., or of J. & P. Coats, Limited. 3242

SIXTH.—That J. & P. Coats, Limited, are not entitled to the possession of the securities covered by said "special escrow" of August 27th, 1907, as the same remained and are, and as delivered to Kessler & Company, Ltd., on October 25th, 1907, and to a lien thereon for the amount remaining due them (J. & P. Coats, Limited) on the four drafts for £5000 each drawn by Kessler & Company on Kessler & Company, Ltd., on or about August 27th, 1907, and purchased by J. & P. Coats, Limited. 3243

Dated, New York, May 20th, 1907.

W. D. GUTHRIE,
Solicitor for defendant,
J. & P. Coats, Limited.

(Endorsed)—Exceptions of J. P. Coates, Ltd. Filed
May 25th, 1908.

3244

U. S. DISTRICT CO.,

S. D. N. Y.

 IN RE KESSLER & Co.

 LAWRENCE E. SEXTON,
 Trustee,

AGAINST

 KESSLER & Co., LIMITED.

3245

Hearing on Exceptions to report of P. B. Olney,
 Esqr., Special Master.

MEMORANDA.

Upon the two leading questions of fact tried out before the master, I should, even if in doubt, support the master's findings, as I would the verdict of a jury; the most painful consideration of printed testimony can never supply the deficiency caused by not seeing and hearing the men who testified.

3246 Examination of this evidence, however, leads me to the same conclusion as the master's, and I am of opinion, (1) that on Oct. 25, 1907, Kessler of New York was insolvent within the definition of the Statute, and (2) that if on that day any transfer or conveyance of property was actually made by the New York to the Manchester concern,—the agent of the latter acting therein had reasonable cause to believe that a preference was thereby intended.

I do not suppose that Mr. Kessler of Manchester had thought out the meaning of such legal expressions as "insolvency," "preference" or "reasonable cause," but he did think that the New York house

was in danger of failure, and took the securities ³²⁴⁷ which are the subject matter of this litigation, in order that his company might fare better than others if his New York relatives did not weather the violent financial storm then raging. It is true that Mr. Henri Kessler and, doubtless, all his business associates considered themselves morally and legally entitled to what he took, but this seems immaterial to the present enquiry.

If, therefore, defendant's right, title and interest in and to the property delivered to it on Oct. 25, 1907, sprang into existence on that day, and by virtue of the delivery and transfer then made, such TITLE is invalidated by the Statute, because the act ³²⁴⁸ of transfer under the circumstances involved, and, indeed, itself contributed,—a voidable preference.

If the master's findings of fact are accepted, I have not heard the above proposition doubted or denied.

It is, consequently, incumbent on defendant to show some other right, title or interest in or to the property in question,—existing before the 25th of October, 1907, not obnoxious to the Bankruptcy Act, nor destroyed by subsequent adjudication, and belonging to Kessler & Co., Limited.

Defendant does accordingly assert such a title, defines and describes it as an "Equitable lien," declares it to date from the depositors in "Escrow," ³²⁴⁹—and to have been created by the joint effect of such deposit, the contemporaneous exchange of letters between the Kessler houses and the bookkeeping of the New York firm.

To support this assertion, it would seem natural, first, to ascertain what, in point of fact, the parties intended by an "escrow,"—and as the first head of enquiry to ask what light is cast on their purposes by the use of that word.

The probable truth is that no one concerned in the matter knew what "escrow" meant,—yet the

3250 word must have presented some idea to the minds of its users; and, in my opinion, the correspondence does indicate the thought (consonant with law) that the securities were to stay where they were (*i. e.*, in the possession and under the control of the New York house) until new conditions arose or something untoward occurred.

As for bundling up the stocks and bonds, putting them in an envelope marked "Escrow," leaving the envelope in the New York Kessler's safe deposit box, and changing the items at will,—this process, as a method of giving "security", is about equivalent to one man advising another that the latter
 3251 may consider as his security whatever may at any time be in the first speaker's right hand trousers pocket. And, from a legal standpoint, this matter is not bettered by assuming both parties to be honest, and the security giver scrupulously careful in advising his friend of changes in pocket contents.

It was no other or better indemnity than this which the Manchester house accepted as "security for * * * long drawings," on July 8, 1903; and the intent of parties seems to me quite plainly this, *viz.*: that Kessler of New York should keep on hand—not certain specified securities, but property of sufficient value to enable Kessler of Manchester to repay himself for acceptance of long drawings,
 3252 in case he either preferred to do so, or found it necessary. It is inconceivable that any English house would prefer to obtain such repayment by liquidating American stocks and bonds of a quality confessedly open to grave criticism; and the final and irresistible inference is that the "security" was to pass into the control of the creditor, for whose benefit it was set aside in "escrow," only when it was deemed advisable to take it in order to prevent other creditors from getting some or all of the same.

To enforce such an agreement as this seems to me ³²⁵³
open to several fundamental objections.

(A) The contracting party (the bankrupt) did not make any particular property or fund security for the debt by virtue of which defendant seeks to hold what it got on Oct. 25, 1907. Nothing more was done than to agree to keep on hand—not particular specified property, but—property of a particular approximate value, i. e.: the amount of current long drawings. This, in my opinion, does not create an equitable lien within Pomeroy's accepted definition (Eq. Juris. Sec. 1235); and this conclusion is the substantial ground, as I understand it, of the master's decision, in which I concur. ³²⁵⁴

(B) The phrase "equitable lien" is not complete and self-explanatory. It is a convenient expression, meaning (as Mr. Pomeroy indicates) that if the agreement between the parties is lawful, not only in inception, but when fully carried out, and if when complete it violates no rule of law,—then equity will, as always, follow the law, but will also regard as done that which ought to be done, and give decree accordingly.

To call a lien "equitable," therefore, does not tell the whole story: that adjective relates only to the forum which may be sought for its enforcement, ³²⁵⁵ and the question always remains—what description of lawful lien will be created by the enforcement of the parties' agreement?

In this case that question may be thus put—as suming (apart altogether from the effect of a Bankruptcy Statute) that what was done on October 25th was in pursuance and fulfilment of the parties' agreement,—by what title does defendant hold the securities in question? Clearly, as pledgee. What, then, does "equitable lien" mean, as applied to this transaction? Nothing more than an endeavor to enforce an agreement for a pledge,

3256 unaccompanied by any contemporaneous transfer of possession. In my opinion, no such equitable lien does or can exist; it would be a contradiction in terms, and amount to a most inequitable infraction of the law of pledge.

Buffalo G. I. Co. *v.* Third National Bank, 162 N. Y. 163;

Wilson *v.* Little, 2 N. Y. 446;

Security Warehousing Co. *v.* Hand, 206 U. S. 415.

(C) It may be assumed, and I think correctly, that the original escrow agreement were good *inter partes*. They did not, however, confer any
3257 present rights enforceable at law.

The test of this seems to me to be the obvious fact that Kessler of Manchester could not have maintained an action of replevin for the securities in question against Kessler of New York—before demand (at all events).

The filing of the petition in bankruptcy, followed by adjudication, produced a creditor (i. e., the trustee), who became entitled to the bankrupt's estate (with exceptions here unimportant) as of a date four months before petition filed. Who owned these securities four months before petition filed?
3258 Clearly the bankrupt; subject only to the enforcement of a contract under which no demand had been made.

The bankrupt's title, as of that date, vested by law in the trustee; and nothing done by the bankrupt thereafter can destroy it. Unless the bankrupt had parted with title before that time, or made a contract valid in law, so to do *in futuro*, his power and authority is gone.

This bankrupt had made no contract to part with title, to sell or grant absolutely. He had made an agreement to validly and lawfully pledge certain property on demand. Now, it may be assumed that

such agreement was and is void in equity *inter partes*; but equity will not enforce it, as against the rights of other creditors as represented by a trustee in bankruptcy. This I believe to be the law of New York, as disclosed in

Zartman v. 1st National Bank, 189
N. Y. 273.

Interesting as this subject is, it does not seem necessary to pursue it further. It is wholly a question of New York law, which this court cannot declare with authority, and finds quite difficult to trace through cases, inharmonious in judicial language, though, I think, consistent in result. 3260

The report of the Special Master is confirmed and exceptions overruled.

Master's compensation to be fixed at \$2500, to be paid by trustee, and master will be repaid any stenographer's expenses incurred by him. Final decree will carry costs, but only one-half master's fee will be taxed.

Aug. 20, 1908.

C. M. Hough,
D. J.

(Endorsed)—Opinion 8/20/08.

3262

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Post Office Building, New York City on the 27 day of Novr. 1908.

Present—Hon. CHARLES M. HOUGH, *Judge*.

3263

LAWRENCE E. SEXTON, as trustee in bankruptcy of ALFRED KESSLER, RUDOLF E. F. FLINSCH and WILLIAM K. GILLETT, composing the firm of Kessler & Company, and of the said KESSLER & COMPANY,

Complainant,

AGAINST

KESSLER & COMPANY, Limited, and Frank Youatt Liquidator and J. & P. COATS, Limited, intervenor,

Defendants.

3264

This cause came on to be heard on the 15th day of June, 1908, upon the exceptions to the report of the Special Master, and was argued by counsel for the complainant, the defendant and the intervenor respectively; thereupon upon consideration thereof, it is

Ordered, adjudged and decreed, that said exceptions filed to said report be and the same are hereby overruled and the report of the said master Peter B. Olney, Esq., be and the same is hereby in all respects confirmed; and it is further

Ordered, adjudged and decreed, that the complainant have judgment as prayed for in his bill of complaint; and it is further

Ordered, adjudged and decreed that the transfer on or about the 25th day of October, 1907, by the above bankrupt Kessler & Company to the defendant Kessler & Company, Limited, of the following property and securities, to wit:

45 Orleans County Quarry Co. first mortgage six per cent gold coupon bonds, numbered 21-45 inclusive, 51-70 inclusive for \$1000. each with coupon No. 4 of April, 1908, and all subsequent coupons attached.

3 notes signed by Milne, Turnbull & Co. to the order of Kessler & Company at four months dated respectively July 11th, 1907, August 27th, 1907, and August 27th, 1907, for \$16,000. \$7,000. and \$17,000. respectively.

Note of the R. B. McLea Company to order of Kessler & Company dated August 5th, 1907, for \$5-000. at four months.

6 certificates of the preferred stock of Cripple Creek Central Railway Company numbered 177-180 inclusive, A 1015, A 946, aggregating 466 shares.

3 certificates of the common stock of the Cripple Creek Central Railway Company each for 100 shares, numbered B 172, B 173 and B 174.

15 certificates of the common stock of the United Lighting & Heating Company numbered 203-205 inclusive, 207-209 inclusive, 213-215 inclusive, 287-290 inclusive, 292 and 293, aggregating 2428 shares.

14 certificates of the preferred stock of the Daimler Manufacturing Company, numbered A 4-A 13 inclusive and A 20-A 23 inclusive, aggregating 1341 shares.

56 first mortgage six per cent coupon bonds for \$1000. each of the United Breweries Company, numbered 472, 819-825 inclusive, 1676, 2051-2070 in-

3268 clusive, 2661-2663 inclusive, 2995-3002 inclusive and 3013-3028 inclusive, with coupon No. 19 for February, 1908, and all subsequent coupons attached.

4 notes of the United Breweries Company each dated September 17th, 1903, to the order of the maker for \$15,000., \$10,000. and \$5,000. and \$20,000. respectively and due September 17th, 1911, September 17th, 1912, September 17th, 1913, and September 17th, 1914, respectively.

Certificate numbered O 168 of the Underground Electric Railways Company of London, Limited, dated August 18th, 1902, to the effect that 1000
3269 shares of £10 each numbered 293131-294130 are owned by Kessler & Company with assignment in blank; together with two notices of call numbered 395 and 595 by the Underground Electric Railways Company of London, Limited, for £2500 each, and the receipts for the payment thereof.

Certificate No. B 311, dated January 2nd, 1903, issued by the Central Trust Company of New York as trustee to the effect that Kessler & Company is entitled to 2000 shares, of the par value of £1 each, of the Underground Electric Railways Company of London, Limited, in the trust fund under an agreement dated September 8th, 1902, between the
3270 Metropolitan District Electric Traction Company, Limited, the Underground Electric Railways Company of London, Limited, and the Central Trust Company of New York.

2 certificates of common stock of the Standard Roller Bearing Company, numbered 145 and 196 for 50 and 20 shares respectively; and one certificate of the preferred stock of the said company numbered A 116 for 100 shares; together with all assignments thereof.

10 certificates of stock of the Elkton Consolidated Mining and Milling Company, numbered 30595-30604 inclusive, each for 1000 shares.

5 certificates of the preferred stock of the United States Reduction & Refining Company, numbered 1324-1328 inclusive, each for 100 shares. 3271

10 certificates of the common stock United States Reduction & Refining Company, numbered B 34, B 35, B 74, B 1306-B 13010 inclusive, B 96 and B 97, each for 100 shares.

45 first mortgage five per cent gold coupon bonds due October, 1935, of the Pittsburg, Westmoreland & Somerset Railroad, numbered 201-228 inclusive and 417-433 inclusive, each for \$1000. with coupons numbered 5 for April, 1908, and all subsequent coupons attached.

12 General & Refunding Mortgage 5% twenty year gold coupon bonds, due 1926, of the Indiana, Columbus & Eastern Traction Company, numbered 1618-1829 inclusive, each for \$1000., with coupon No. 4 due May, 1908, and all subsequent coupons attached. 3272

3 certificates of the common stock of the Muskogee Gas & Electric Company, numbered 19-21 inclusive, aggregating 288 shares; 3 certificates of the preferred stock of said company numbered 24-26 inclusive, aggregating 288 shares; 22 first and refunding mortgage 5% gold coupon bonds, due December 1, 1926, of the said Muskogee Gas & Electric Company, numbered 149-170 inclusive for \$1000. each, with coupons numbered 2 for December 1st, 1907, and all subsequent coupons attached. 3273

Receipt No. 5 dated July 6th, 1905, from Blair & Company (for syndicate managers) \$7234.28 paid by Kessler & Company for subscription of \$40,000. of first mortgage 5% thirty year gold bonds of the Western Pacific Railway Company; together with assignment of same executed in blank by Kessler & Company.

6 certificates of the 4 per cent. preferred stock B of the Chicago, Great Western Railway Company

3274 numbered A 2435-A 2439 inclusive and 921 aggregating 548 shares.

The following documents affecting the real property known as 1018-1020 Bedford Avenue, Brooklyn, N. Y., described as follows: BEGINNING at a point on the westerly side of Bedford Avenue 237 feet southerly from the corner formed by the westerly side of Bedford and the Southerly side of DeKalb Avenues, running thence westerly 100 feet to a point distant 237 feet 8 inches southerly from the southerly side of DeKalb Avenue measured on a line drawn parallel with Bedford Avenue; running thence southerly parallel with Bedford Avenue 72 feet 9 inches, thence easterly parallel with DeKalb Avenue and part of the way through a party wall 100 feet to the Westerly side of Bedford Avenue, and thence northerly along the westerly side of Bedford Avenue 73 feet 5 inches to the place of beginning.

Bond from Catherine I. MacKay and husband to Title Guarantee & Trust Company for \$10,000. dated and acknowledged June 16th, 1892, payable June 16th, 1893, with 5% interest.

3276 Mortgage from the said Catherine I. MacKay and husband to the Title Guarantee & Trust Company of the same date, covering a part of the above described premises, recorded in Liber 2411 of Mortgages, page 431, in the Register's office of Kings County.

Assignment of said bond and mortgage to William G. Vermilye dated July 9th, 1892, and recorded in said Register's office in Liber 2417 of Mortgages, page 423, July 13th, 1892.

Extension agreement of said bond and mortgage dated December 11th, 1897, between William G. Vermilye and Edward J. Halligan.

Assignment of said bond and mortgage from William G. Vermilye to Emma G. Lathrop dated

May 8th, 1899, and recorded in said office in Sec- 3277
tion 7, Liber 20 of Mortgages, page 401.

Assignment dated February 19th, 1903, of said
bond and mortgage from Emma G. Lathrop to
Henry Kessler.

Deed William K. Gillett and Mary, his wife, to
Henry Kessler, dated November 13th, 1905, and
covering the premises above described, constituted
an unlawful preference within the meaning of the
Act of Congress known as the Bankruptcy Act, and
said transfer is hereby set aside; and it is further

Ordered, adjudged and decreed that the owner-
ship and right to possession of the said property
and securities and also to certain notes of the Pitts- 3278
burg, Westmoreland & Somerset Railroad Com-
pany, which notes pursuant to an order of this court
heretofore made herein were substituted in place of
the coupons due between April 1st, 1908, and Oc-
tober 1st, 1909 (both dates inclusive), and at-
tached to the aforesaid bonds of said Railroad, is
not in the defendants or either of them, wholly or
in part, but is solely and exclusively in the com-
plainant as trustee in bankruptcy as aforesaid;
and it is further

Ordered, adjudged and decreed that the defend-
ant Kessler & Company, Limited, its officers, em-
ployees and agents, and the Hanover Safe Deposit 3279
Company of No. 7 Nassau Street, New York City,
the present custodian of said property and secur-
ities, be and they each and all are hereby ordered
within ten days after the service upon the Hanover
Safe Deposit Company and upon the solicitors for
the defendant Kessler & Company, Limited, of a
copy of this decree, to deliver to Lawrence E. Sex-
ton as trustee in bankruptcy as aforesaid, the com-
plainant herein, the said notes of the Pittsburg,
Westmoreland & Somerset Railroad, and the said
property and securities and each and all thereof
except such as are herein described as having been

3280 already disposed of pursuant to the order of this court, and also to deliver as aforesaid deed dated and acknowledged October 31st, 1907, from Henry Kessler of Manchester, England, and Gertrude Sophia, his wife, to Kessler & Company, Limited, of Manchester, England, and deed dated December 27th, 1907, executed by said Henry Kessler and wife in blank, covering the premises above described, and an assignment of the said mortgage executed in blank by said Henry Kessler and his wife.

And it appearing that during the pendency of this suit and pursuant to an order of this court herein,
3281 the said one hundred shares of preferred and seventy shares of common stock of the Standard Roller Bearing Company have been withdrawn from the custody of the said the Hanover Safe Deposit Company of New York, and delivered to third parties in consideration among other things of the sum of \$5600. which have been deposited, to abide the event of this suit, with the New York Trust Company to the joint order of the complainant, the defendant Kessler & Company, Limited, and Frank Youatt, as liquidator of said defendant; and it further appearing that, during the pendency of this suit and pursuant to an order of this court herein,
3282 the said \$12,000 par value of first mortgage bonds of the Indiana, Columbus and Eastern Traction Company have been withdrawn from the custody of the Hanover Safe Deposit Company of New York and sold and delivered to Drexel & Co. in consideration, among other things, of the sum of \$10,756.66. which have also been deposited in said Trust Company to the joint order of the same said persons to abide the event of this suit; and it further appearing that during the pendency of this suit and pursuant to an order herein, certain interest coupons attached to some of the bonds hereinbefore enumerated have been withdrawn from the custody of the

said Hanover Safe Deposit Company of New York ³²⁸³
and cashed, and the proceeds thereof deposited with
said New York Trust Company to the joint order of
the same said persons, which coupons and the pro-
ceeds thereof are as follows:

Interest due December 1, 1907, on \$22,000 par value Muskogee Gas & Elec. Co. 5% bonds	\$ 550.
Interest due June 1, 1908, on \$22,000 par value Muskogee Gas & Elec. Co. 5% bonds	550.
Interest due April 1, 1908, on \$45,000 par value Orleans County Quarry Co. bonds. .	1350.
Interest due October 1, 1908, on \$45,000 par value Orleans County Quarry Co. bonds. .	1350. ³²⁸⁴
Interest due May 1, 1908, on \$12,000 par value Indiana, Columbus & Eastern Trac- tion Co. 5% bonds	300.
Interest due February 1, 1908, on \$56,000 par value United Breweries Co. 6% bonds	1680.
	<hr/> \$5780.

and it further appearing that during the pendency
of this suit the following dividends have been re-
ceived and deposited in said New York Trust Com-
pany to the joint order of said same persons:

June 29th, 1908, dividend of 1½ cents per share on 10,000 shares Elkton Consoli- dated Mining & Milling Co. stock \$150, less 37 cents exchange	\$149.63 ³²⁸⁵
August 25th, 1908, dividend of 1½ cents per share on 10,000 shares Elkton Con- solidated Mining & Milling Co. stock \$150, less 37 cents exchange.	149.63
	<hr/> \$299.26

It is ordered, adjudged and decreed that the said
monies so deposited as aforesaid in the said New

3286 **York Trust Company**, together with all interest accrued or to accrue thereon, are the sole property of the complainant herein as trustee in bankruptcy aforesaid, and the said New York Trust Co. is hereby ordered and directed within 10 days after the service upon it of a certified copy of this decree to honor checks drawn against the whole or any part of said monies by the complainant as trustee as aforesaid alone, without the signatures of either the defendant **Kessler & Company, Limited**, or **Frank Youatt** as liquidator of said defendant or any other person or persons. But it is further

Ordered, adjudged and decreed that, as a further
 3287 and cumulative relief to the complainant and without prejudice to any of the previous provisions of this decree, the defendant **Kessler & Company, Limited**, and **Frank Youatt**, its liquidator, within 10 days after the service upon the solicitors for said defendant of a copy of this decree, each sign and deliver to the complainant, as trustee as aforesaid, a check or checks upon the said New York Trust Company signed by the said **Kessler & Company, Limited**, and **Frank Youatt**, its liquidator, to the order of the complainant as trustee in bankruptcy as aforesaid for all the said monies so deposited as aforesaid with the said Trust Company together
 3288 with all interest accrued or to accrue to the date of delivery of said check. And it is further

Ordered, adjudged and decreed that the defendant **Kessler & Company, Limited**, and its servants and agents execute such deeds, bills of sale or other transfers as may be requisite properly to vest the title in the said complainant as trustee as aforesaid of such of the foregoing securities or property as may stand in the name of the said defendant or of any of its servants or agents, or as may be necessary to clear the title thereto in the said complainant as trustee as aforesaid; and it is further

Ordered, adjudged and decreed that **Lawrence E.**

Sexton as trustee as aforesaid, the complainant 3289
 herein, have and recover of the defendants the costs
 of this suit taxed at the sum of \$925.25 and one-
 half of the fees of the master, the said one-half
 amounting to the sum of \$1,250; making in all the
 sum of \$2,175.25; and it is further

Ordered, adjudged and decreed that the inter-
 vening petition or cross bill filed by J. & P. Coats,
 Limited, be and the same is hereby dismissed upon
 the merits.

C. M. HOUGH,

D. J.

(Endorsed)—Decree.—Filed December 4th, 1908. 3290

Please take notice that a decree, a copy of which
 is annexed hereto, was this day filed and entered in
 the office of the Clerk of the U. S. District Court,
 Southern District of New York.

NEW YORK, December 4th, 1908.

Yours, etc.,

JOHN LARKIN,

Attorney for Complainant,
 44 Wall Street, New York City.

To WM. D. GUTHRIE, Esq.,

Attorney for J. & P. Coats, Ltd.

3291

Messrs. McLAUGHLIN, RUSSELL, COE & SPRAGUE,
 Solicitors for Kessler & Co., Ltd.

3292 DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Kessler & Company and of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the said Kessler & Company, bankrupts,

Complainant, In Equity.

3293

vs.

KESSLER & COMPANY, LIMITED,
and J. & P. Coats, Limited,
intervenors,

Defendants.

3294

The defendant Kessler & Company, Limited, upon a petition by Frederick McLaughlin, Esq., one of its solicitors, verified November 23rd, 1907, obtained an order dated that day requiring Lawrence E. Sexton as receiver in bankruptcy of the above-named bankrupts to show cause why an order should not be made referring to a special commissioner the conflicting claims of the said Kessler & Company, Limited, and of Lawrence E. Sexton as Receiver of the said bankrupt, to certain securities set forth at length in the decree herein; which petition and order are hereto annexed. An order was thereafter made on November 26th, 1907, referring said conflicting claims to Peter B. Olney, Esq., as Special Master to hear and determine the same upon the merits, which order is hereto annexed. Thereafter on November 30, 1907, the said

Lawrence E. Sexton as such receiver in bank- 3295
 ruptcy, and the said Kessler & Company, Limited,
 appeared by their respective solicitors before said
 Special Master and testimony was taken, and on
 said day the said receiver in bankruptcy filed his
 petition in the nature of a bill of complaint, which
 petition is hereto annexed; and thereafter on De-
 cember 10th, 1907, the said Kessler & Company,
 Limited, filed its answer to said petition, by which
 answer it expressly waived a plenary suit, which
 answer is hereto annexed. Thereafter the said
 Lawrence E. Sexton was elected and appointed
 trustee in bankruptcy of said bankrupts, and an or-
 der was duly made on February 7th, 1908, substi- 3296
 tuting Lawrence E. Sexton as trustee of said bank-
 rupts as complainant herein in the place and stead
 of Lawrence E. Sexton as receiver in bankruptcy of
 said bankrupts, which order is annexed hereto.
 Thereafter J. & P. Coats, Limited, filed its petition,
 verified February 27th, 1908, asking leave to inter-
 vene herein and file a petition in the nature of a
 cross-bill, and that the issues raised thereby be re-
 ferred for hearing and determination to Peter B.
 Olney, Esq., as Special Master, which said petition
 is hereto annexed.

Thereafter, on March 30th, 1908, an or-
 der was made granting to the said J. & P. Coats, 3297
 Limited, leave to intervene and file a petition in the
 nature of a cross bill, the allegations of which
 should be deemed to be denied by the complainant,
 Lawrence E. Sexton, as trustee as aforefaid, and re-
 ferring the issues as thus raised to Peter B. Olney,
 Esq., as Special Master to take proof and report
 with his opinion, the said order being by the terms
 thereof entered as of March 3rd, 1908, the date said
 application was made; the said order is annexed
 hereto.

On March 23rd, 1908, an order was duly
 made upon consent of the complainant, of Kessler

3298 & Company, Limited, and of said J. & P. Coats, Limited, that this suit be deemed in all respects a suit brought in equity in the District Court of the United States for the Southern District of New York, by Lawrence E. Sexton, as trustee in bankruptcy as aforesaid, against Kessler & Company, Limited, in pursuance of the Bankruptcy Act, and be governed by all the law and rules of procedure relating thereto, and that the pleadings interposed be deemed the pleadings in said suit; which order also amends *nunc pro tunc* as of November 26th, 1907, the order of that date by making the reference to Peter B. Olney, Esq., one to him as Master
 3299 in Chancery to take testimony and report with his opinion, which said order is hereto annexed.

Testimony was theretofore and thereafter taken by the respective parties before the said Master in Chancery, and afterwards was filed in the Clerk's office of the District Court with the report of the Master and his opinion thereon, which report and opinion were also filed with said Clerk, and were in favor of the complainant that the transfer of said securities should be set aside, and dismissing the cross bill of the said intervenor. Exceptions to said report and opinion of the Master were filed by intervenor on May 25, 1908, and by the defendant on
 3300 June 3, 1908.

Afterwards and at the June, 1908, term of said court, present the Hon. Charles M. Hough, the said cause came on to be heard upon the pleadings, proof, report, opinion, and the exceptions thereto filed by the defendant and the intervenor, and was argued by counsel; and on the 4th day of December, 1908, a final decree of said court was filed and entered in favor of the complainant, by which it was adjudged that said cross bill of said intervenor J. & P. Coats, Limited, be dismissed upon the merits, and that said transfer of securities to the defendant Kessler & Company, Limited, be set aside and

that the same and the proceeds of a part thereof 3301
be delivered up to the complainant, together with
costs and one-half the Master's fees, the said final
decree being annexed hereto.

And the costs having been taxed by the Clerk at
\$925.25, the pleadings, decree, together with other
papers filed in said cause, are duly annexed here-
unto.

Wherefore let the said Lawrence E. Sexton
as trustee in bankruptcy as aforesaid recover of
said defendant Kessler & Company, Limited, the
sum of \$925.25, costs, and \$1,250, one-half of the
Master's fees, amounting in all to \$2,175.25, and let
the said securities and the proceeds thereof be de- 3302
livered up as adjudged in said final decree.

Signed and enrolled this 4th day of December,
A. D. 1908.

THOMAS ALEXANDER,
Clerk.

(Endorsed)—Final Record.—Filed Dec. 4th, 1908.

3304

At a Stated Term of the United States District Court for the Southern District of New York, held at the United States Post Office Building, Borough of Manhattan, City of New York, on the 14th day of December, 1908.

Present—Honorable CHARLES M. HOUGH,
District Judge.

1305

LAWRENCE E. SEXTON, as
Trustee in Bankruptcy of
Alfred Kessler, Rudolf E. F.
Flinsch and William K.
Gillett, composing the firm
of Kessler & Company, and
the said KESSLER & COMPANY,
Complainant,

AGAINST

KESSLER & Co., LIMITED, FRANK
YOUATT, Liquidator, and J.
& P. COATS, Intervenor,
Defendants.

3306

A decree having been entered herein in equity on the 4th day of December, 1908, and application having been made by McLaughlin, Russell, Coe & Sprague, Solicitors for Kessler & Co., Limited, and Frank Youatt, Liquidator, for an order to be entered at the foot of said decree to define the disposition of the property and securities, the subject of this suit, mentioned in the bill of complaint herein, and in said decree pending the appeal to the Circuit Court of Appeals for the Second Circuit, from said decree about to be taken by Kessler & Co., Limited, and Frank Youatt, its Liquidator, defendants now, on motion of said McLaughlin,

Russell, Coe & Sprague, and after hearing John 3307
 Larkin, Esq., solicitor and of counsel for Lawrence
 E. Sexton, as Trustee in Bankruptcy aforesaid,
 complainant herein, it is

Ordered that at the foot of said decree there be
 entered the following, to wit:

It is hereby ordered, adjudged and decreed that
 the property and securities mentioned in the
 said bill of complaint and in said decree, which
 are now in the vaults of the Hanover Safe Deposit
 Company, of No. 7 Nassau Street, City, County
 and State of New York, and Southern District of
 New York, in a box in the name of Kessler & Co.,
 Limited, shall be turned over by the defendants 3308
 Kessler & Co., Limited, and Frank Youatt,
 Liquidator, to Lawrence E. Sexton, the complain-
 ant as Trustee in Bankruptcy of the above-named
 bankrupts, to be held by him as an officer of this
 Court, and to be kept by him in a box in his name
 as such Trustee and as officer of this Court, in the
 said Hanover Safe Deposit Company, or such other
 safe deposit company in the said County and State
 of New York, and Southern District of New York,
 as may be agreed upon in writing by the said com-
 plainant and said defendants, there to remain dur-
 ing the pendency of said appeal, and that said prop-
 erty and securities shall not be removed therefrom 3309
 or disposed of by said Lawrence E. Sexton, as such
 trustee and as officer of this Court, except upon
 order of this Court made after notice, or upon the
 written consent of Kessler & Co., Limited, and
 Frank Youatt, its Liquidator, or their solicitors,
 McLaughlin, Russell, Coe & Sprague, and it is

Further ordered, adjudged and decreed that
 said complainant, Lawrence E. Sexton, as Trustee
 aforesaid as an officer of this Court, may collect
 dividends, coupons, rents and interest accruing on
 said property and securities, and that, if at any
 time it be agreed by consent in writing of the com-

3310 plainant and said defendants, or their respective solicitors or be directed by order of this Court upon notice that any of said property and securities shall be sold or realized upon from time to time, the proceeds of such sales and the realizations therefrom in cash, together with all dividends, coupons, rents and interest which may be collected on said property and securities as the same shall accrue, pending said appeal, shall be deposited by the complainant as Trustee aforesaid and as an officer of this Court, in the New York Trust Company in the City, County and State of New York and Southern District of New York, one of the designated depositories of this Court, there to remain during the pendency of said appeal, and not to be withdrawn by said complainant as Trustee aforesaid and as officer of this Court except upon order of this Court upon notice or the consent in writing of said Kessler & Co., Limited, Frank Youatt, the Liquidator, or McLaughlin, Russell, Coe & Sprague, their solicitors, and it is

Further ordered, adjudged and decreed that the moneys mentioned in said decree as being now on deposit in said New York Trust Company to the joint credit of Lawrence E. Sexton, as Trustee aforesaid or officer of this Court, Kessler & Co., Limited, and Frank Youatt, the Liquidator, shall be turned over by the defendants Kessler & Co., Limited, and Frank Youatt, its Liquidator, to the complainant, Lawrence E. Sexton, as Trustee aforesaid as officer of this Court, and shall remain on deposit in his name as such officer in said New York Trust Company pending the appeal, and shall not, pending the appeal herein, be withdrawn from said Trust Company by said Lawrence E. Sexton as Trustee aforesaid as officer of this Court, unless by order of this Court upon notice or by written consent of Kessler & Co., Limited, and Frank

Youatt, its Liquidator, or McLaughlin, Russell, 3313
Coe & Sprague, their solicitors.

C. M. HOUGH,
D. J.

(Endorsed)—Order at foot of Decree of Dec. 4th,
'08.—Filed Dec. 14, 1908.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

3314

LAWRENCE E. SEXTON, as
Trustee in Bankruptcy of
Alfred Kessler, Rudolf E. F.
Flinsch and William K.
Gillett, composing the firm
of Kessler & Company, and
the said KESSLER & COMPANY,
Complainant,

AGAINST

KESSLER & Co., LIMITED, FRANK
YOUATT, Liquidator, and J.
& P. COATS, LIMITED, In-
tervenor,
Defendants.

3315

PETITION FOR APPEAL.

The above named defendants, Kessler & Com-
pany, Limited, and Frank Youatt, Liquidator
thereof, conceiving themselves aggrieved by
the decree made and entered by the above
named Court in the above entitled cause on

3316 the 4th day of December, 1908, do hereby
appeal from said decree to the United States
Circuit Court of Appeals of the Second Circuit for
the reasons specified in the assignment of errors
which is filed herewith. And the above named in-
tervenor and defendant J. & P. Coats, Limited,
having as appears by its waiver hereto annexed,
declined to join in the appeal and waived and re-
nounced its rights of appeal herein and consented
to a severance, the said Kessler & Company,
Limited, and Frank Youatt, Liquidator, pray that
they be allowed this appeal and that their interests
be severed in this appeal from the said J. & P.
3317 Coats, Limited, and that a transcript of the record
papers and proceedings upon which said decree
was made, duly authenticated, may be sent to the
United States Circuit Court of Appeals of the
Second Circuit.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,
Solicitors for Defendants,
Kessler & Company, Ltd., and
Frank Youatt, Liquidator,
thereof.

UNITED STATES DISTRICT COURT, 3319
SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as
Trustee in Bankruptcy of
Alfred Kessler, Rudolf E.
F. Flinsch and William
K. Gillett, composing the
firm of Kessler & Com-
pany, and of the said
KESSLER & COMPANY,
Complainant,

AGAINST

KESSLER & Co., LIMITED,
Frank Youatt, Liquidator,
and J. & P. COATS, LIM-
ITED, Intervenor,
Defendants.

Renunciation of
Right to Appeal
and Consent
to Severance. 3320

J. & P. Coats, Limited, appearing herein and
waiving the issuance and service of a summons
and severance, or notice to join in appeal, hereby
renounces its right to appeal from the decree
made and entered herein on or about the 4th day 3321
of December, 1908, and declines to join in the ap-
peal from said decree by Kessler & Co., Limited,
Frank Youatt, Liquidator, defendants, and con-
sents that an order may be made herein, without
further notice, allowing the defendants, Kessler
& Co., Limited, and Frank Youatt, Liquidator, to
appeal separately and apart from J. & P. Coats,
Limited, intervenor and defendant, and that the
appeal may be severed in that respect.

Dated NEW YORK, December 9, 1908.

J. & P. COATS, LTD.,

By Spool Cotton Co., Agents,
Theodore Freylinghausen, Treas.

(Endorsed)—Petition for Appeal.—Filed Dec.

14, '08.

3322

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as
 Trustee in Bankruptcy of
 Alfred Kessler, Rudolf
 K. Gillett, composing the
 firm of Kessler & Com-
 pany, and of the said
 KESSLER & COMPANY,
 Complainant,

3323

AGAINST

KESSLER & COMPANY, LIM-
 ITED, Frank Youatt, Liqui-
 dator, and J. & P. COATES,
 LIMITED, Intervenor,
 Defendants.

In Equity.

ASSIGNMENT OF ERRORS.

3324

And now comes the defendants Kessler & Com-
 pany, Limited, and Frank Youatt, Liquidator
 thereof, and file the following assignment of errors
 upon which they will rely on this appeal from the
 decree in equity entered herein on December 4,
 1908.

FIRST.—That the District Court of the United
 States for the Southern District of New York
 erred in overruling each and all of the respective
 exceptions filed herein by the defendant Kessler
 & Company, Limited, to the report of Peter B.
 Olney, Master, and in confirming the report herein
 of said Peter B. Olney, Master.

SECOND.—That the said Court erred in granting judgement to the complainant as prayed for in his bill of complaint. 3325

THIRD.—That the said Court erred in adjudging and decreeing that there was a transfer on or about the 25th day of October, 1908, by the bankrupts, Kessler & Company, to the defendant, Kessler & Company, Limited, of the property and securities set forth in the decree herein, and that said transfer constituted an unlawful preference within the meaning of the Act of Congress known as the Bankruptcy Act, and in setting aside said transfer. 3326

FOURTH.—That the said Court erred in adjudging and decreeing that the ownership and right of possession of the said property and securities mentioned in said decree, were and are not in the defendant, Kessler & Company, Limited, wholly or in part, but were and are solely and exclusively in the complainant as Trustee in Bankruptcy, as aforesaid.

FIFTH.—That the said Court erred in ordering the defendant, Kessler & Company, Limited, its officers, employees and agents and the Hanover Safe Deposit Company of No. 7 Nassau Street, New York City, within ten days after service on said Hanover Safe Deposit Company and upon the solicitors for the said Kessler & Company, Limited, of a copy of the decree to deliver to the complainant Lawrence E. Sexton as Trustee in Bankruptcy, aforesaid, the property, securities and deeds mentioned in said decree. 3327

SIXTH.—That the said Court erred in ordering the New York Trust Company within ten days after the service of a copy of the decree to honor checks against funds deposited in said New York

- 3328 Trust Company to the credit of Lawrence E. Sexton, as Trustee in Bankruptcy aforesaid, the complainant, and Kessler & Company, Limited, the defendant, and Frank Youatt, Liquidator of said defendant, drawn by the complainant, Lawrence E. Sexton as Trustee aforesaid, alone.

SEVENTH.—That the said Court erred in ordering the defendant Kessler & Company, Limited, and Frank Youatt, its liquidator, within ten days after the service upon the solicitors for said defendant of a copy of said decree to sign and deliver to the complainant as trustee in Bankruptcy, aforesaid, a check or checks on the said New York Trust Company signed by the said Kessler & Company, Limited, and Frank Youatt, its Liquidator, to the order of the complainant as Trustee in Bankruptcy aforesaid for all moneys deposited as aforesaid with the said New York Trust Company, and interest thereon.

3329

EIGHTH.—That the said Court erred in ordering that the defendant Kessler & Company, Limited, and its servants and agents execute such deeds, bills of sale or other transfers as may be requisite to vest title in the complainant as Trustee in Bankruptcy aforesaid, and such of the securities and property mentioned in said decree as stand in the name of defendant or any of its servants or agents, or such as may be necessary to clear the title thereto in said complainant as Trustee in Bankruptcy aforesaid.

3320

NINTH.—That the said Court erred in not dismissing the bill of complaint.

TENTH.—That the said Court erred in not holding and deciding that there was a transfer of the property and the securities set forth in the bill of complaint and in the decree to the defendant

Kessler & Company, Limited, by the said bank-³³³¹
rupts at a date more than four months before the
filing of the petition in bankruptcy against said
bankrupts valid against the complainant as Trust-
tee of said bankrupts.

ELEVENTH.—That the said Court erred in hold-
ing and deciding that the right, title and interest of
the defendant, Kessler & Company, Limited, to the
property and securities mentioned in said decree
came first into existence on October 25th, 1907.

TWELFTH.—That the said Court erred in not
holding and deciding that the defendant, Kessler³³³²
& Company, Limited, had an equitable lien on the
property and securities mentioned in the bill of
complaint and in said decree valid against the
complainant as Trustee in Bankruptcy.

THIRTEENTH.—That the said Court erred in not
holding and deciding that the delivery of physical
possession of the property and securities mention-
ed in the bill of complaint and in the said decree
by the said bankrupts to the defendant, Kessler &
Company, Limited, on the 25th day of October,
1907, was in accordance with a valid contract made
at a time prior to four months before the filing of
the petition in bankruptcy against the bankrupts³³³³
and in not finding that said contract was valid and
effective against the complainant as trustee of said
bankrupts.

FOURTEENTH.—That the said Court erred in
holding and deciding that the bankrupts did not
make any particular property or fund security
for the debt or obligation by virtue of which the
defendant, Kessler & Company, Limited, seeks to
hold the property and securities mentioned in the
bill of complaint and in said decree, physical pos-
session of which was given to it on October 25th,

3334 1907, and in holding and deciding that the bankrupts did not agree to keep on hand particular, specified property as security for the debt due to the defendant, Kessler & Company, Limited.

FIFTEENTH.—That the said Court erred in holding and deciding that the agreement and contract between the bankrupts and the defendant, Kessler & Company, Limited, and the course of conduct of the parties thereunder, as appears in the record, did not create an equitable lien in favor of the defendant, Kessler & Company, Limited, on the property and securities mentioned in the bill of complaint and in said decree valid and effective against complainant as trustee in bankruptcy aforesaid.

3335

SIXTEENTH.—That the said Court erred in failing to hold and decide that there was prior to the four months next preceding the filing of the petition in bankruptcy herein, a *bona fide* engagement by the said bankrupts with the defendant, Kessler & Company, Limited, to convey specific property amounting to an equitable lien valid against the complainant as Trustee in Bankruptcy.

SEVENTEENTH.—That the Court held in holding and deciding that on October 25th, 1907, Kessler & Company, was insolvent within the definition of the Bankruptcy Act.

3336

EIGHTEENTH.—That the said Court erred in holding and deciding there was a transfer by the bankrupts of the property and securities mentioned in said decree to the defendant Kessler & Company, Limited, on the 25th day of October, 1907, and that at that time the defendant Kessler & Company, Limited, or its agents had reasonable cause to believe that a preference was intended.

NINETEENTH.—That said Court erred in failing to hold and decide that there was an express ex-

ecutory agreement in writing between Kessler & ³³³⁷ Company, of New York, the bankrupts, and the defendant Kessler & Company, Limited, and made prior to four months next preceding the filing of the petition in bankruptcy against said bankrupts (whereby Kessler & Company, of New York, sufficiently indicated an intention to make the particular property described in said agreement a security for the debt or other obligation of the bankrupts to the defendant, Kessler & Company, Limited (enforceable against the complainant as trustee in bankruptcy of said bankrupt.

TWENTIETH.—That the said Court erred in not holding and deciding that the defendant Kessler ³³³⁸ & Company, Limited, had a right, title and interest in or to the property and securities mentioned in the bill of complaint and in said decree, existing before the 25th of October, 1907, not obnoxious to the Bankruptcy Act nor destroyed by the adjudication in bankruptcy of said bankrupts, and valid against the complainant as trustee in bankruptcy.

TWENTY-FIRST.—That the said Court erred in holding and deciding that the agreements between the said bankrupts and the defendant Kessler & Company, Limited, set forth in the record in relation to the property and securities mentioned in the bill of complaint and in the decree did not ³³³⁹ confer any present rights at the time of making said agreements in Kessler & Company, Limited, enforceable at law.

TWENTY-SECOND.—That the said Court erred in holding and deciding that the said bankrupts did not at a time more than four months prior to the filing of the petition in bankruptcy part with the title to the property and securities mentioned in the bill of complaint and in the said decree to the defendant Kessler & Company, Limited, or make a valid contract so to do in future.

3340 TWENTY-THIRD.—That the said Court erred in holding and deciding that equity will not enforce as against the complainant as Trustee in Bankruptcy, the agreement disclosed by the record between the bankrupt aforesaid and the defendant Kessler & Company, Limited.

3341 TWENTY-FOURTH.—That the said Court erred in not holding and deciding that the legal or equitable property in the securities mentioned in the bill of complaint and in said decree passed to the defendant Kessler & Company, Limited, prior to the filing of the petition in bankruptcy against the said bankrupts, and that there is no express law invalidating the transfer on the facts disclosed in the record.

TWENTY-FIFTH.—That the said Court erred in holding that the complainant was entitled to recover any costs herein from the defendant Kessler & Company, Limited.

3342 TWENTY-SIXTH.—That the said Court erred in adjudging and decreeing that the complainant recover of the defendant one-half of the fees of the Master in Chancery amounting to Twelve Hundred and Fifty Dollars (\$1,250).

WHEREFORE the defendant Kessler & Company, Limited, and Frank Youatt, liquidator thereof, pray that the decree may be reversed and that said Court may be directed to dismiss the bill of complaint herein.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,
Solicitors for Defendants, Kessler &
Company, Limited, and Frank
Youatt, Liquidator thereof.

Endorsed.—Assignment of Errors.—Filed Dec. 14, 1908.

UNITED STATES DISTRICT COURT,

3343

SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Company, and of the said Kessler & Company,
Complainant,

AGAINST

KESSLER & COMPANY, LIMITED,
FRANK YOUATT, Liquidator,
and J. & P. COATS, LIMITED,
Intervenor,
Defendants.

Order Allowing
Appeal, Severance and Su- 3344
persedeas.

The defendants, Kessler & Company, Limited, and Frank Youatt, Liquidator, thereof, having heretofore filed herein their petition for an appeal and for a severance of interests in this appeal from the intervenor defendant J. & P. Coats, Limited, and it appearing by the written waiver and renunciation of said J. & P. Coats, Limited, that it has declined to join in said appeal, and has renounced its right of appeal herein, and consented that the interests of Kessler & Company, Limited, and Frank Youatt, Liquidator thereof, be severed in this appeal, and the defendants, Kessler & Company, Limited, and Frank Youatt, Liquidator, having filed an assignment of errors, said appeal is hereby allowed to the petitioners Kessler & Company, Limited, and Frank Youatt, Liquidator, and

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3346 their interests in said appeal are hereby severed from those of said J. & P. Coats, Limited.

Said appeal is to operate as a supersedeas of the decree herein of December 4th, 1908, and a stay of execution of said decree pending such appeal as to the defendants Kessler & Company, Limited, and Frank Youatt, Liquidator, only, but is not to affect compliance with a certain order entered at the foot of said decree on the 14th day of December, 1908, upon the execution of a bond in the penalty of \$5,000.

The American Surety Company, of New York, is accepted as surety on said bond, and said bond
3347 is now approved.

December 14, 1908.

C. M. HOUGH,
D. J.

(Endorsed)—Order allowing Appeal, Severance and Supersedeas.—Filed Dec. 14, '08.

3348

DISTRICT COURT OF THE UNITED STATES 3349

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillette, composing the firm of Kessler & Company, and of the said Kessler & Company,
Complainant,

AGAINST

KESSLER & COMPANY, LIMITED,
FRANK YOUATT, Liquidator,
and J. & P. COATS, LIMITED.
Intervenor,
Defendants.

In Equity.

3350

Know all Men by These Presents, That we, Kessler & Company, Limited, and Frank Youatt, the above named defendants and the American Surety Company, of New York, are held and firmly bound 3351
unto the above named plaintiff and complainant, Lawrence E. Sexton, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillette, composing the firm of Kessler & Company, and of the said Kessler & Company in the sum of Five thousand dollars (\$5,000), to be paid to the complainant for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 12th day of

3352 December, in the year of our Lord one thousand nine hundred and eight.

Whereas, the above named Kessler & Company, Limited, and Frank Youatt have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Judicial Circuit to reverse the decree rendered in the above entitled suit by the Hon. Charles M. Hough, Judge of the District Court of the United States for the Southern District of New York, on December 4th, 1908.

Now, therefore, the condition of this obligation is such, That if the above named Kessler & Company, Limited, and Frank Youatt shall prosecute
 3353 the said appeal to effect, and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Signed and delivered, taken and acknowledged, this 12th day of December, 1908, before me.

KESSLER & Co., LTD. [L. S.]

KESSLER & Co., LTD. [L. S.]

FRANK YOUATT, Liquidator,

By RUFUS W. SPRAGUE, JR.,

Attorney in fact.

3354 AMERICAN SURETY COMPANY, OF NEW YORK.

Attest:

H. H. SIMPSON,

[L. S.] Resident Asst. Secretary.

RICHARD DEMING,

Resident Vice-President.

STATE OF NEW YORK, }
 County of New York. }

On this 12th day of December, 1908, before me personally came Rufus W. Sprague, Jr., the attorney in fact of the Kessler & Company, Limited, and Frank Youatt, to me known to be the individuals

described in, and who as such attorney, executed 3355
the foregoing instrument and acknowledged that he
executed the same as the act and deed of said Kessler & Company, Limited, and Frank Youatt, therein
described, and for the purposes therein mentioned.

KESSLER & Co., LTD. [L. S.]

KESSLER & Co., LTD. [L. S.]

FRANK YOUATT, Liquidator,

By RUFUS W. SPRAGUE, JR.,

[NOTARY'S SEAL]

ROBERT P. SMITH,

Notary Public,

Westchester County.

Cert. filed in N. Y. Co. 3356

(Endorsed) — Bond on Appeal.—Approved, New
York, Dec. 14th, '08. C. M. Hough, D. J.—
Filed Dec. 14th, 1908.

STATE OF NEW YORK, {
County of New York, { ss. :

On this 15th day of Dec., 1908, before me personally appeared Richard Deming, Resident Vice-President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and says: that he resides in Ossining, New York; that he is the Resident Vice-President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation; that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Richard Deming further said that he is acquainted with H. H. Simpson, and knows him to be one of the Resident 3357

- 3358 Assistant Secretaries of said Corporation; that the signature of said H. H. Simpson subscribed to the said instrument, is in the genuine handwriting of the said H. H. Simpson, and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Richard Deming, Resident Vice-President.

JARED F. HARRISON, JR.,

Notary Public.

[L. S.]

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

3359

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of ALFRED KESSLER, RUDOLF E. F. FLINSCH and WILLIAM K. GILLETT, composing the firm of KESSLER & COMPANY, and of the said KESSLER & COMPANY,

Complainant,

AGAINST

3360

KESSLER & COMPANY, LIMITED, FRANK YOUATT, Liquidator, and J. & P. COATS, LIMITED, Intervenor,

Defendants.

Citation on Appeal.

United States of America, ss:

To Lawrence E. Sexton, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Company, and of the said Kessler & Company,

You are hereby cited and adminished to be and ³³⁶¹
 appear before the United States Circuit Court of
 Appeals for the Second Circuit, to be holden at the
 Borough of Manhattan, in the City of New York,
 in the District and Circuit above named, on the
 11th day of January, 1909, pursuant to an appeal
 filed in the Clerk's Office of the District Court of
 the United States for the Southern District of New
 York, in Equity, wherein Kessler & Company,
 Limited, and Frank Youatt, its liquidator, defend-
 ants-appellants and you are complainant-appellee
 to show cause, if any there be, why the decree in
 said appeal mentioned should not be reversed, modi-
 fied or corrected, and speedy justice should not be ³³⁶²
 done in that behalf.

Given under my hand at the Court House in the
 Borough of Manhattan, City of New York, in the
 Southern District of New York, this 14 day of
 December, in the year of Our Lord, One Thousand
 Nine hundred and Eight, and of the Independence
 of these United States the one hundred and thirty-
 third.

C. M. HUGH,

District Judge of the United States
 For the Southern District of New York

(Endorsed)—Citation on Appeal.—Filed Dec. 14. ³³⁶³
 1908.

I hereby admit service of a true copy of the
 within citation on appeal.

Dated City of New York, N. Y., December 16th,
 1908.

JOHN LARKIN,
 Solicitor for Lawrence E. Sexton,
 as Trustee in Bankruptcy, etc.,
 Complainant,
 No. 44 Wall Street,
 New York City, N. Y.

3364

SEXTON, Trustee,

VS.

KESSLER & Co., LTD., *et al.*

The within are true copies of the testimony, exhibits, pleadings, court orders, etc., comprising the entire record on appeal herein.

Jan. 15/09.

3365

McLAUGHLIN, RUSSELL, COE & SPRAGUE,
Solicitors for Defendants-Appellants.

JOHN LARKIN,
Solicitor for Complainant-Respondent.

UNITED STATES OF AMERICA,
Southern District of New York, } ss. :

3366

LAWRENCE E. SEXTON, a Trustee in Bankruptcy of Alfred Kessler *et al.*, comprising the firm of KESSLER & Co., Bankrupts,
Complainants,

AGAINST

KESSLER & Co., LIMITED, FRANK YOUATT, Liquidator, and J. & P. COATES, LIMITED, Intervenor,
Defendants.

I, THOMAS ALEXANDER, Clerk of the District Court of the United States of America for the

Southern District of New York, do hereby Certify 3367
that the foregoing is a correct transcript of the
record of the District Court in the above-entitled
cause.

In testimony whereof, I have caused the seal of
the said Court to be hereunto affixed, at the City of
New York, in the Southern District of New York,
this 19 day of Jany. in the year of our Lord one
thousand nine hundred and nine, and of the Inde-
pendence of the said United States the one hundred
and thirty-third.

THOS. ALEXANDER,
Clerk.

[SEAL]

3368

UNITED STATES CIRCUIT COURT OF
APPEALS,

SECOND CIRCUIT.

LAWRENCE E. SEXTON, as Trus-
tee in Bankruptcy, etc.,
Complainant-Appellee,

AGAINST

KESSLER & Co., LTD., and FRANK
YOUATT, Liquidator,
Defendants-Appellants.

3369

It is hereby stipulated as follows:

1. That the following pages of the certified
record on appeal from the District Court herein be
not printed, viz. : 42, 652 to 655, inclusive, 802, 803,
814, 902, 1160, 1210, 1267 and 1278.

2. That of pages 979 to 1159, inclusive, of the said
certified record on appeal the parts struck out in

3370 ink or pencil be not printed and at the beginning of the Exhibits contained in said pages on page 979, or immediately before the first of the Exhibits included within the pages just mentioned, there be printed the following statement: "From the following letters have been omitted passages containing items of family or personal news and general gossip."

3371 3. That complainant's Exhibit 74 (a) comprising pages 1304 to 1362, inclusive, of the record as certified from the District Court, and consisting of the Schedules in bankruptcy of the firm of Kessler & Co. be not printed in full, but that only page 1363 thereof, being the summary of assets and liabilities attached to said schedules, be printed, and also the following as a statement of the remainder of said exhibit as applicable to this suit:

Schedule A-2 shows creditors holding securities, and contains the names of the following secured creditors: National Park Bank, Merchants' National Bank, Central Trust Company, J. P. Morgan & Co., Glyn, Mills, Currie & Co., Lloyds Bank, Limited; Cunliffe Bros., National City Bank, Louis Dreyfus & Co., A. Ruffer & Sons, Von Willer & Co., Kessler & Co., Limited; Len & Co., Inc.; Basler Handelsbank, Bank Fur Handel & Industrie,
3372 Deichmann & Co.

Said schedule A-2 contains a list of the said securities so held by the respective creditors and those securities opposite the name of the defendant Kessler & Co., Ltd., are the same securities as are in litigation in this suit. The indebtedness there listed to Kessler & Co., Ltd., is \$377,815.73, and the alleged value of the said securities is \$495,584.28, exclusive of two lots of securities which are not valued.

4. That pages 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377 and

1378 of the record as certified from the District 3373 Court, which cover Complainant's Exhibits 74 to 88, inclusive, which exhibits are pages 44 to 52 of Kessler & Co., the bankrupts' debit journal, and pages 40 to 45 of their credit journal, both for October 25, 26, 27, 28, 29 and 30, 1907, be not printed in full, but that instead thereof the following be taken as a summary of said exhibits as applicable to this suit:

These exhibits 74 to 88, inclusive, contain a statement of the business done by the bankrupts from October 25th, 1907, to October 30th, 1907, and show a loss of about \$500. in the assets of Kessler & Co., the bankrupts, between October 25th, 1907, 3374 and October 30th, 1907, as a result of the business.

Dated New York, February 2, 1909.

JOHN LARKIN,

Solicitor for Complainant-Appellee.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,

Solicitors for Defendants-Appellants.

So ordered.

E. H. LACOMBE,

U. S. C. J.

United States Circuit Court of Appeals for the Second Circuit.

No. 263, October Term, 1908.

Argued March 23, 1909; Decided May 14, 1909.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy, etc., Complainant-Appellee,

vs.

KESSLER & COMPANY, LTD; FRANK YOUATT, Liquidator, Defendants-Appellants,
and

J. & P. COATS, LTD., Intervenor, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Ward, and Noyes, Circuit Judges.

WARD, *Circuit Judge*:

Kessler & Company, of New York, engaged in the business of banking and foreign exchange, had for a long time drawn upon Kessler & Co., Ltd., of Manchester, without giving any security for payment of its drafts. Early in 1903 the Manchester house wrote the New York house as follows:

"We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to provide this immediately, and as we in no way wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30 of June of this year, by which date the necessary securities should be set aside for us and a list sent to us. We do not propose to name a fixed amount of credit; suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced.

"We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for."

In accordance with this letter the New York house on June 30 wrote the Manchester house:

"In accordance with instructions from Mr. Alfred Kessler, we have to-day placed in a separate package in our safe deposit vaults the following securities, package marked 'Escrow for account of Kessler & Co., Limited, Manchester':

1484 shares Oklahoma Gas & Electric Co., at 25.....	\$37,100
2428 shares United Lighting & Heating Co., at 12.....	29,136
2352 shares Daimler Manufacturing Company, at 50....	117,600
\$373,000 United Breweries Co. first 6's, at 65.....	242,245

\$406,081

This escrow is intended as a protection against our long drawings against your good selves."

July 8 the Manchester house replied as follows:

"We are in receipt of your favor of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up to us and the matter goes in order.

If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality."

December 23, 1903, the Manchester house wrote to the New York house as follows:

"For the purpose of the audit of our books for our yearly balance sheet, we should feel obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against your drawing credit with us. We should like this done annually on the 31st December.

We do not think the matter will present any difficulty for you. Something in the form of the enclosed is what we require. * * *

We certify that we have specially set aside and hold for your acct. on this, the 31st day of December, '03, as security for the drawing credit which you accord us, the following securities.

Names, secs. and market value."

The New York house not only conformed to these directions but in addition entered the securities so set aside and all substitutions of them on their loan book and notified the Manchester house of substitutions made from time to time. The securities were always either negotiable by delivery or endorsed in blank. The two houses did business in strict conformity with the foregoing arrangement until the fall of 1907 when a financial panic occurred in the City of New York.

October 25 the stability of the New York house being in doubt it delivered to an agent of the Manchester house then in New York City the escrow securities, which he deposited in a safe deposit company in the name of the Manchester house.

November 8 a petition in bankruptcy was filed against the New York house and November 27 it was adjudicated a bankrupt. This is an action in equity brought by the trustee in bankruptcy to set aside the transfer of the securities because made within four months prior to the filing of the petition, the New York house being insolvent and the Manchester house knowing or having reason to know that fact and the intention being to give it a preference. The matter was referred to a master who found in accordance with the prayer of the bill and his report was confirmed by the District Judge from whose decree this appeal is taken.

The master and the District Judge both held the transaction in question to be a pledge or an agreement to pledge the escrow securities and that the delivery of them under the circumstances stated in the bill within four months of the filing of the petition in bankruptcy constituted a voidable preference under the Bankrupt Act.

It may be admitted that the conclusion so reached was entirely right if the arrangement is to be regarded as a pledge or a promise to pledge, possession being essential to the existence of a pledge. This relieves us from the necessity of examining authorities relating to pledges. A word, however, may be said as to the cases of *Casey v. Cararoc*, 96 U. S. 467; *Casey v. National Bank*, *id.* 492 and *Casey v. Schuchardt*, *id.* 494, upon which the appellant especially relies. In the second case a receipt was given by the bank which might have been treated as a declaration of trust, but the defendant relied on its rights as a pledge. What Mr. Justice Bradley said in the last case was undoubtedly true of all the cases, "As the only claim made by Schuchardt & Sons in their answer to the securities in question is by way of pledge and as there was no such delivery and retention of possession by them or their agents or trustees as the law requires to constitute the privilege of a pledge as to third persons, their claim cannot be sustained."

The intention to secure is plain, but this could have been accomplished not only by a pledge, which is the usual course of business in case of choses in action but by a mortgage or by a trust. It can hardly be doubted that a formally executed declaration of trust as to specific securities by the New York house in favor of the Manchester house would have been good. The New York house although the maker of the trust, could have properly acted as the trustee, *Locke v. Trust Co.*, 140 N. Y. 135, to the extent of the trust, viz. the protection of the Manchester house for its acceptances.

As the transaction was a perfectly honest one, a construction should be adopted to give it effect, if that is possible. In their correspondence the parties used neither the words mortgage, nor pledge nor trust, but the inapt word escrow, which they probably did not understand. What they did, however, clearly evidences their intention. The credit to be given to the New York house was not to depend alone upon its strength but also upon additional security to be given to the Manchester house. The New York house being the absolute owner of certain specified securities agreed in accordance with the requirement of the Manchester house to hold them for its account and to that end both segregated them from their other securities and entered them upon their books as so appropriated. The Manchester house as the equitable owners authorized the New York house to withdraw the specified securities from time to time for their own purposes not absolutely, but upon condition that they should substitute securities of equal value, which was always done. There were accordingly, during the whole period of this credit, specified earmarks or traceable securities held by the New York house for account of the Manchester house. The use of the word collateral does not necessarily indicate a pledge. It is important only as showing that the Manchester house's ownership of or interest in the securities was only for the purpose of protecting it for accepting the drafts of the New York house.

Considering the family relation and the long business dealing between the two houses and the fact that they were dealing three thousand miles apart and that they had entire confidence in each

other, the arrangement made was natural and reasonable. It was sufficiently precise to protect the Manchester house and elastic enough to meet the ordinary requirements of the business of the New York house.

If the transaction had been a mortgage of the securities the delivery of them October 25, 1907, would have been good as against the trustee in bankruptcy because under the law of the State of New York mortgages of choses in action need not be filed, Lien Law Sec. 90; *Humphrey v. Tutman*, 198 U. S. 91. Doubtless a court of equity would not intervene to enforce or perfect an imperfect mortgage as against the other creditors of the mortgagor, but no such assistance would have been needed, the mortgagor having voluntarily carried out the purpose of the mortgage by delivering the securities to the mortgagee. This would have been legal, notwithstanding the insolvency of the mortgagor and the knowledge of that fact by the mortgagee, *Hauselt v. Harrison*, 105 U. S. 401; *Wood v. U. S. Fidelity Co.*, 143 F. R. 424.

So in the case of trust receipts the courts of New York have been astute to carry out the intention of the parties. The course of business is as follows: A banker gives a letter of credit to the purchaser of goods to enable him to pay for them upon condition that bills of lading to the banker's order for the goods shall be delivered to him, accompanied by a draft upon the purchaser. Upon arrival of the goods the banker delivers the bill of lading to the borrower, he executing a trust receipt to hold or sell the goods as the property of the banker for his benefit. Without defining exactly what the relation between the lender and the borrower is as to the goods, that is, whether it is that of mortgagor and mortgagee or of pledgor and pledgee, or a conditional sale, the courts have steadily protected the right of the lender in the goods so delivered, *Farmers Mechanics Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32; *Drevel v. Pease*, 133 N. Y. 129.

We regard the transaction in question as a declaration of trust in respect to the escrow securities by the New York house in favor of the Manchester house. Being the absolute owner of the securities, it declared in consideration of its right to draw that it held and would hold the same and all securities subsequently substituted therefor for the benefit of the Manchester house. From that moment the legal title was in the New York house, but the equitable in the Manchester house, the New York house holding the securities in a fiduciary capacity. This was the condition on which the Manchester house gave the drawing credit which continued for several years and it was because of its ownership that its authority to substitute securities was needed and was given.

We do not apprehend that this conclusion will result in the consequences foretold by the appellee. The public was not giving credit to the New York house on the strength of its apparent ownership of these securities because it knew nothing at all about them. The visible possession of chattels apparently owned by the possessor creates a wholly different situation. In respect to such property the law prohibits secret liens as against creditors. Yet ownership of

chattels where there has been no change of possession will be protected if they are set apart and marked and in this way notice given to the public. *First National Bank v. Pennsylvania Trust Co.*, 124 *F. R.* 968. There was, however, as to the securities under consideration no secrecy which was not inherent in their nature. The public does not know what stocks, bonds or notes a merchant has, and therefore does not give him credit because of them. There is no evidence that any exhibition of or statement as to these securities was made to anyone by the New York house for the purpose of obtaining credit. Their books if examined would have shown what the real dealing between them and the Manchester house was.

If there had been no insolvency and the New York house had withdrawn securities without substituting others a court of equity would have compelled it to do so, or at least would have enjoined it from making such withdrawals, at the suit of the Manchester house. If having failed to cover its drafts, the New York house had refused to deliver the securities to the Manchester house, a court of equity would have compelled it to do so. In delivering the securities to the Manchester house October 25, 1907, the New York house acted without the compulsion of a court of equity in strict accordance with the trust it had declared four years before, when entirely solvent. For the first time in that course of dealing there was an expectation that the New York house would not cover its drafts; that the Manchester house would have to pay them and would need to realize upon the securities which the New York house held for its protection. No new right or privilege was then created voidable under the Bankrupt Act. The delivery of these earmarked securities was in strict pursuance of the agreement made long before on the strength of which the credit was given. *Sabin v. Camp*, 98 *F. R.* 974, cited with approval in *Thompson v. Fairbanks*, 196 *U. S.* 516, 524. A liberal construction should be given to these transactions in aid of the obvious intention of the parties.

The decree of the court below is reversed with costs.

A. I. Elkus and *F. C. McLaughlin*, for the Appellants.
John Larkin and *J. Frankenheimer*, for the Complainant.

United States Circuit Court of Appeals for the Second Circuit.

No. 263, October Term, 1908.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy, etc., Complainant-Appellee,

vs.

KESSLER & COMPANY, LTD., FRANK YOCATT, Liquidator, Defendants-Appellants, and J. & P. Coats, Ltd., Intervenor, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Argued March 23, 1909; Decided May 14, 1909.

Before Lacombe, Ward, and Noyes, Circuit Judges.

Appeal from the District Court, Southern District of New York. In view of the statement of facts in the foregoing opinion of Judge Ward, a separate statement is here unnecessary. Such additional facts, however, as have been found necessary to be considered are incorporated in the opinion.

NOYES, *Circuit Judge* (concurring):

While I concur in the result reached by Judge Ward, I am constrained to base my conclusions upon essentially different grounds. And the case is of such importance, both on account of the amount in controversy and the principles involved, that a separate opinion seems called for.

In considering the case from any point of view, one thing is apparent from the outset, and that is the good faith of the parties. Another thing is also apparent. The New York house intended that the securities in question should afford protection to the Manchester house for their acceptances, and the latter supposed that they were obtaining protection. Both parties acted upon the assumption that that which they did accomplished something. The New York house furnished security in the form desired by the Manchester house and the latter accepted the former's drawings upon that security. The transaction if invalid is only so because it contravenes some statute or positive legal principle. And it cannot be declared invalid without inflicting great hardship upon the Manchester house.

In determining the validity of the transaction, it is necessary in the first place to ascertain what its legal nature was. Judge Ward has held that it amounted to a declaration of trust by the New York house in favor of the Manchester house. But I cannot accept this conclusion. It is an essential element in a declaration of trust that title pass from the declarant of the trust as an individual to himself as trustee. It must be shown that he intends to divest himself of the beneficial interest in the property and to hold it thereafter as trustee for the benefit of another. Now it is clear from the

evidence that this is just what the New York house did *not* intend to do. They intended to set aside the obligations only as *security* for their indebtedness to the Manchester house. In case this indebtedness were paid, the latter were to have no interest in the security. The beneficial interest in the property—the equity of redemption—instead of passing to the Manchester house—as would be essential in a declaration of trust—was intended by both parties to remain in the New York house. The initial setting aside of the securities and the course of dealing between the two houses, were, in my opinion, wholly inconsistent with the creation or existence of a declaration of trust. The transaction must stand, if at all, as one in which the Manchester house obtained security only.

Now security might have been afforded either by way of mortgage or pledge. The general distinction between a mortgage and a pledge is that in one the title passes but not necessarily the possession, while in the other the title does not pass but the possession must. A pledge is a mere lien and something less than a mortgage. As said by the Master of the Rolls in *Jones v. Smith, 2 Ves. Jr. 372*: "A mortgage is a pledge and more; for it is an absolute pledge to become an absolute interest if not redeemed at a certain time." In this case, the bonds, certificates of stock, promissory notes and other securities were duly endorsed and assigned so that when Kessler and Company of Manchester took possession of them shortly before the bankruptcy proceedings the title to them passed even if it had not done so before. Under these conditions there is the highest authority for saying that when the Manchester house received the securities so endorsed and assigned, it had a double title to them—that of mortgagee and pledgee. In the very case principally relied upon by the defendants—*Casey v. Carver, 96 U. S. 467, 477*—the Supreme Court of the United States in speaking of a case where bills receivable had been both pledged and assigned to a creditor said:

"In such case, they [the securities] are held by the creditor by way of mortgage as well as pledge; and a mortgage is valid notwithstanding the mortgagor has the possession. The difference ordinarily recognized between a mortgage and a pledge is, that the title is transferred by the former, and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge (Pothier, *Nantissement*, 8); and if possession be once given up, the pledge, as such, is extinguished. The possession need not be actual; it may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case, there is a union of two distinct forms of security,—that of mortgage

and that of pledge; mortgage by virtue of the title, and pledge by virtue of the possession.

This advantage exists when notes and bills are transferred to a creditor by way of collateral security. His possession of them gives them the character of a pledge. Their endorsement if payable to order, or their delivery if payable to bearer, gives him the title also, which is something more than a pledge. This double title existed in *White v. Platt*, 5 Denio 269, and in *Clark v. Iselin*, 21 Wall. 360. Hence the actual possession of the securities by the creditor was a matter of less importance in those cases."

I fully appreciate that this language of the Supreme Court seems in conflict with the generally accepted doctrine that a pledge of choses in action does not necessarily become a mortgage because the title is conveyed. In the case of a chose in action there cannot well be a pledge without an assignment. Thus if negotiable paper does not require endorsement, title passes to the pledgee upon delivery; if endorsement is necessary, the fact that it is made does not—it is generally held—necessarily make the transaction a mortgage. In such a case it is necessary that the pledgee should have the title in order to obtain effectual security. Consequently, it has usually been said in the case of endorsed shares of stock and negotiable paper that whether a transaction should be regarded as a mortgage or a pledge, must be determined from the agreement between the parties.

Accepting this latter view as correct there is much to support the contention that the parties in this case intended something more than a pledge. They used the word "escrow" which has usually to do with the passing of title. The securities were delivered to the Manchester house as being *its* property and they had previously been set aside and marked with its name. But I think it unnecessary to determine whether the transaction was a mortgage or a pledge. It is sufficient to say in view of the decision of the Supreme Court, as well as in view of the facts shown in addition to the endorsements indicating a mortgage, that the Manchester house after taking possession, may safely be regarded as holding *both* by way of mortgage and by way of pledge.

Indeed the case of *Casey v. Cavarac supra* would seem to afford authority for the conclusion that the transaction might be valid as a mortgage even if Kessler and Company of Manchester had not taken actual possession of the securities before the bankruptcy. As shown in the extract from the opinion already quoted, the matter of the physical possession of securities is of less importance when they are so endorsed that title will pass than when there is a mere attempted pledge. And in another part of the opinion the court said (96 U. S. 486):

"It must not be overlooked that the Credit Mobilier has no other claim to the securities in question but that of pledge. A pledge, and possession, which is its essential ingredient, must be made out, or their privilege fails. An agreement for a pledge raises no privilege. There is no mortgage; for the title of the securities was never transferred to them. The evidence of the cashier is, that they were all stamped payable to the order of the bank, when discounted. They

were not indorsed by the cashier until the day they were removed by Cavaroe, which was after the bank had failed."

Moreover, were the fact of taking possession absent in this case it would probably be possible to sustain the claim of the Manchester house to the securities upon broader and more satisfactory lines than could be drawn from the distinction just referred to. The legal difference *before delivery* of endorsed and unendorsed securities—except in the case of special indorsements—would seem to be slight. But the equities of the case coupled with what the parties did—aside from any technicality—make out a strong case in support of an equitable lien in the nature of a mortgage upon the security in favor of the Manchester house, valid against the trustee in bankruptcy without a change of possession. It is unnecessary, however, to determine the case—nor to consider it at length—upon the theory that there was no change of possession because, as we have seen, the Manchester house did take possession of the securities and such act is a factor of importance. And, as already shown, after the Manchester house took possession it held the securities both by way of mortgage and by way of pledge.

Now, there being no fraud in the transaction and no rights of purchasers or attaching creditors having intervened, the taking possession of the securities by the Manchester house before the bankruptcy was, in the absence of a statute making it unlawful, entirely legal and proper. Regarded simply as a pledge, the pledgee had the right to take possession. Thus in *Parshall v. Eggert*, 54 N. Y. 18, the court said:

"In the absence of any intermediate right, the parties could perfect a written contract of pledge by subsequent delivery. Even between successive pledgees, without any communication with each other, that one who lawfully obtains possession, at the time of the pledge or subsequently, is entitled to be preferred. * * * A creditor who acquires a specific right to or lien on the thing pledged, may prevent the pledgee's interest in an undelivered chattel from attaching. But such is not the condition of the creditor at large. The only ground on which he can claim to prevent the perfecting of such a right in the pledgee is that it works a fraud upon him."

And in *Jones on Pledges*, (2d Ed.) § 38 it is said:

"A pledge or contract for a pledge, ineffectual for want of delivery, may be rendered valid by a subsequent delivery, even as against an intermediate creditor at large of the pledgor. Of course such subsequent delivery would not prevail against a creditor who had, between the time of the making of the contract and taking possession under it, acquired a specific lien upon the thing pledged by attachment or levy of execution. The only other obstacle which could prevent such a transaction from being effectual would be the intervention of fraud."

When, therefore, the Manchester house obtained possession of the securities it lawfully held them as pledgee and mortgagee unless its rights were affected by some statute. And the only statute which it claimed to operate against it is the provision of the bankruptcy act making transfers of property made under certain conditions within

four months of bankruptcy unlawful preferences. So the primary question whether the act applies in this case is whether, within its meaning, the securities in question were *transferred* within four months of the bankruptcy. If they were not so transferred there was no preference. And the determination of the question of time will dispose of all questions concerning the securities constituting the general escrow.

Manifestly at some time there was a transfer of the securities. When did it take place? If it took place at the time the parties intended to charge the securities for the benefit and protection of the Manchester house; when they were put aside and endorsed; when the equities of the Manchester house were *created*, it took place more than four months prior to the bankruptcy. If, on the other hand, it took place only when the physical possession of the securities was taken, it was within the prescribed period.

Now, as bearing upon this question of time, it is clear that the Manchester house had the *right* at any time to demand and take possession of the securities set aside for its benefit. While the necessity for immediately taking possession was evidently not contemplated by the parties, I think that the very fact that the securities were set aside "in escrow" shows that the right of the Manchester house to take possession was recognized at the beginning. Delivery upon condition is the very essence of an escrow and while that term was improperly used by the parties here to describe their transaction, I think it still carries with it the idea of delivery. And, there being no agreement otherwise, delivery would take place when required by the Manchester house. I have no doubt that after demand the Manchester house could have enforced its rights to the possession of the securities in equity if not in law.

The possession having been actually taken within four months of the bankruptcy, we now reach the decisive question whether it can be held to relate back to the time when the right to take possession was created—whether the act of taking possession created a lien or merely enlarged and perfected an existing lien. And, in my opinion, in view of the equities between the parties and all the circumstances, such act should relate back to the creation of the right which it perfected, and the *transfer* be regarded as having taken place more than four months before the bankruptcy.

The case of *Thompson v. Fairbanks*, 196 U. S. 516, seems directly in point here. In that case a mortgagee took possession, with the consent of the mortgagor, of after acquired property covered by a valid mortgage within four months before bankruptcy proceedings against the mortgagor. But the Supreme Court held that this was done pursuant to a pre-existing right and did not constitute a preference, and quoted with approval the following extract from *Sabin v. Camp*, 98 Fed. 974, where it was held that a transaction which was consummated within the prescribed period was not a preference, because it had originated before:

"What was done was in pursuance of the pre-existing contract, to which no objection was made. Camp furnished the money out of which the property, which is the subject of the sale to him, was

created. He had good right, in equity and in law, to make provision for the security of the money so advanced, and the property purchased by his money is a legitimate security, and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals. And when, at a later date but still prior to the filing of the petition in bankruptcy, Camp exercised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law."

The Supreme Court then went on to say:

"The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created, is recognized in the above case. So in this case, although there was no actual existing lien upon this after-acquired property until the taking of possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. The Supreme Court of Vermont has held that such a mortgage gives existing lien by contract, which may be enforced by the actual taking of possession, and such lien can only be avoided by an execution or attachment creditor, whose lien actually attaches before the taking of possession by the mortgagee. Although this after-acquired property was subjected to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the act. There is a distinction between the bald creation of a lien within the four months, and the enforcement of one provided for in a mortgage executed years before the passage of the act, by virtue of which mortgage and because of the condition broken, the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid, except as above stated."

See also *Humphrey v. Tidman*, 108 U. S. 91; *Wood v. United States Fidelity etc. Co.*, 113 Fed. 421.

I think these principles applicable here. While the Supreme Court in the cases referred to treats the validity of the mortgages and the rights of the mortgagees thereunder to be matters of local law, in my opinion it also states this underlying and controlling distinction: The exercise of a pre-existing right well founded in equity is not a preference although occurring within the prescribed period; "the bald creation of a lien within four months" is a preference.

The application of the principle involved in this distinction is decisive here in favor of the Manchester house. It had an equitable right to the securities which were held "in escrow" for its benefit:

its rights and equities were created years before the bankruptcy; it could at any time have enforced its right to the possession of the securities; no element of fraud and no intervening rights of purchasers or attaching creditors appear; the securities were not property the possession of which would be visible to third persons and afford a basis of credit. It is my opinion that possession was taken pursuant to a pre-existing right and that equitable principles support such right. I think that this is in no aspect a case of the bald creation of a lien within four months of bankruptcy.

The case of *Zartman v. First National Bank*, 189 N. Y. 273 relied upon by the appellee as his principal case upon this point, is not in conflict with these views. In that case there was merely a contract to give a mortgage upon after-acquired property. There was no lien which could have been enlarged or perfected by taking possession.

Finally, I think it a serious question whether a mortgagee or pledgee taking possession of property in pursuance and in the enforcement of a pre-existing right of long standing can properly be said to have reasonable cause to believe that the mortgagor in surrendering possession is intending to give him a preference. He takes possession in his own right of that which he looks upon as his own special property. Instead of regarding the transaction as a preference he would, as suggested in *Thompson v. Fairbanks*, 196 U. S. 516, rather take it as a recognition of his right under his mortgage or pledge. (See also *Humphrey v. Tutman*, 198 U. S. 93.)

Upon principles similar to those already considered, I think that the taking of possession by the Manchester house of the securities embraced in the "special escrow" related back to its creation and, consequently, that that transaction although occurring within four months of the bankruptcy, was based upon a contemporaneous consideration and did not constitute a preference.

The decree of the District Court should be reversed with costs.

United States Circuit Court of Appeals, for the Second Circuit.

No. 263, October Term, 1908.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy, etc., Complainant-Appellee,

vs.

KESSLER & COMPANY, LTD., FRANK YOUATT, Liquidator, Defendants-Appellants, and J. & P. Coats, Ltd., Intervenor, Defendant-Appellee.

Appeals from the District Court of the United States for the Southern District of New York.

Argued March 23, 1909; Decided May 14, 1909.

Before Lacombe, Ward and Noyes, Circuit Judges.

LACOMBE, Circuit Judge:

I concur in the conclusion that the decree should be reversed, for the reasons set forth in the opinion of Judge Noyes.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 8th day of June, one thousand nine hundred and nine.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, Circuit Judges.

LAWRENCE E. SEXTON, as Trustee, etc., Complainant-Appellee,
vs.

KESSLER & COMPANY, LTD., FRANK YOUATT, Liquidator, Defendants-Appellants, and J. & P. Coats, Ltd., Intervenor, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed as to the appellants Kessler & Company Limited and Frank Youatt Liquidator, with costs to said appellants, and that the cause be remanded with instructions to dismiss the bill as to them with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. C. N.

Endorsed: United States Circuit Court of Appeals Second Circuit. Lawrence E. Sexton as trustee, etc., vs. Kessler & Co., Ltd., & another. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Jun-9 1909 William Parkin Clerk.

United States Circuit Court of Appeals for the Second Circuit.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillette, Composing the Firm of Kessler & Company, and of the said Kessler & Company, Complainant-Appellee,

against

KESSLER & COMPANY, LIMITED, and FRANK YOUATT, Liquidator, Defendants-Appellants.

Petition for Appeal.

The above named appellee Lawrence E. Sexton as trustee as aforesaid respectfully shows that a final decree has been rendered in the above entitled cause on the 8th day of June 1909 reversing the final decree herein of the District Court of the United States for the South-

ern District of New York and dismissing the complainant's bill of complaint on the merits with costs, and the complainant-appellee conceiving himself aggrieved thereby, and the cause being one in which the United States Circuit Court of Appeals for the Second Circuit has not final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal: the matter in controversy exceeding \$100,000 besides costs.

Wherefore the said complainant-appellee appeals from said decree of the 8th day of June 1909 to the Supreme Court of the United States and prays that this appeal may be allowed and a citation granted directed to the above named defendants-appellants Kessler & Company, Limited and Frank Youatt, Liquidator, commanding them to appear before the Supreme Court of the United States and to do and receive justice in the premises; and that a transcript of the record proceedings and papers upon which the said judgment was rendered may be duly authenticated and sent to the Supreme Court of the United States.

Dated, New York, June 28th, 1909.

JOHN LARKIN,

*Solicitor for Lawrence E. Sexton,
as Trustee as Aforesaid.*

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and is hereby allowed as prayed this 28 day of June, 1909.

E. H. LACOMBE, U. S. C. J.

Endorsed: U. S. Circuit Court of Appeals Second Circuit Lawrence E. Sexton as trustee in bankruptcy, appellee, against Kessler & Company, Limited, and another, Appellants. Petition for appeal, John Larkin, attorney for trustee, 14 Wall Street, New York City, United States Circuit Court of Appeals Second Circuit Filed July 1, 1909 William Parkin Clerk.

United States Circuit Court of Appeals for the Second Circuit.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillett, Composing the Firm of Kessler & Company, and of the said Kessler & Company, Complainant-Appellee,

against

KESSLER & COMPANY, LIMITED, and FRANK YOUATT, Liquidator, Defendants-Appellants.

Assignment of Errors.

Lawrence E. Sexton as trustee in bankruptcy as aforesaid having appealed to the Supreme Court of the United States from the final decree of the United States Circuit Court of Appeals for the Second Circuit dated June 8th 1909 and filed in the office of said clerk on June 9th 1909, reversing the final decree of the District Court of the

United States for the Southern District of New York dismissing the complainant's bill of complaint upon the merits with costs, now makes and files the following assignment of errors herein.

1st. The court erred in reversing said decree of the District Court of the United States.

2nd. The said court erred in awarding costs against the said Lawrence E. Sexton upon reversing said decree.

3rd. The said court erred in remanding the cause to the District Court of the United States with instructions to dismiss the bill of complaint with costs.

4th. The said court erred in holding that the transactions between said bankrupts and the defendant Kessler & Company Limited as found by the Master in Chancery and the District Court of the United States constituted a declaration of trust by the bankrupts in favor of the defendant Kessler & Company Limited in respect to the securities which are the subject of this action, or any securities for which said securities were substituted.

5th. The court erred in holding that any trust of the said securities, or securities for which the said securities were substituted, existed in favor of the defendant Kessler & Company Limited.

6th. The court erred in holding that the facts as found by the Master in Chancery and by the District Court of the United States constituted a mortgage of the said securities from the bankrupts Kessler & Company to the defendant Kessler & Company Limited.

7th. The court erred in holding that the facts as found by the Master in Chancery and by the District Court of the United States constituted a pledge of the said securities from the bankrupts Kessler & Company to the defendant Kessler & Company Limited.

8th. The court erred in holding that the facts as found by the Master in Chancery and by the District Court of the United States constituted an equitable lien in the nature of a mortgage upon the said securities in favor of the defendant Kessler & Company Limited, which equitable lien was valid against the complainant with or without a change of possession.

9th. That the court erred in holding that when the defendant Kessler & Company Limited obtained possession of the said securities on October 25th 1907 it lawfully held them as pledgee or mortgagee.

10th. That the court erred in holding that the transfer of possession of the said securities on October 25th 1907 to the defendant Kessler & Company Limited was not a transfer made within four months of bankruptcy within the meaning of the Act of Congress known as the Bankruptcy Act.

11th. That the court erred in holding that the facts herein as found by the Master in Chancery and by the District Court of the United States did not constitute a voidable preference within the meaning of the Act of Congress known as the Bankruptcy Act.

12th. That the court erred in holding that the transfer of the said securities from the bankrupts Kessler & Company to the defendants Kessler & Co. Limited did not take place within four months of the filing of the petition in bankruptcy.

13th. That the court erred in holding that the taking possession

of said securities by the defendant Kessler & Company Limited on October 25th 1907 related back to June 30th 1903 the time of the arrangement between the bankrupts and the said defendant Kessler & Company Limited or to any other date.

14th. That the court erred in holding that the defendant Kessler & Company Limited had an equitable right to the said securities and that said right and equity were created years before the bankruptcy and that said defendant could at any time have enforced its said right to the possession of said securities, and that no element of fraud or any intervening rights of purchasers or attaching creditors here appear and that said securities were not property, the possession of which would be visible to third persons or would afford a basis of credit, and in holding that such possession was taken by the said defendant on October 25th 1907 in pursuance of a pre-existing right and that no estoppel obtains against the said defendant.

15th. The court erred in holding that the facts herein as found by the Master in Chancery and the District Court of the United States as a matter of law did not and could not constitute reasonable cause in the defendant Kessler & Company Limited to believe that the bankrupts in surrendering possession of said securities on October 25th 1907 intended to give the defendant Kessler & Company Limited a preference, and that said defendant as a matter of law took said possession as a matter of right under a mortgage or pledge.

New York, June 28th 1909.

JOHN LARKIN,

Solicitor for Complainant.

Endorsed: U. S. Circuit Court of Appeals Second Circuit Lawrence E. Sexton as trustee in bankruptcy, appellee, against Kessler & Company, Limited, and another, Appellants. Assignment of Errors. John Larkin, attorney for trustee, 44 Wall Street, New York City. United States Circuit Court of Appeals Second Circuit Filed Jul-1, 1909, William Parkin Clerk.

United States Circuit Court of Appeals for the Second Circuit.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillett, Composing the Firm of Kessler & Company, and of the said Kessler & Company, Complainant-Appellee,

against

KESSLER & COMPANY, LIMITED, and FRANK YOUATT, Liquidator, Defendants-Appellants.

Order Allowing Supersedeas.

The complainant Lawrence E. Sexton as trustee as aforesaid having heretofore filed his petition for an appeal from the final decree rendered herein on the 8th day of June 1909 reversing the final decree of the District Court of the United States of the Southern Dis-

trict of New York herein, and dismissing the complainant's bill of complaint upon the merits with costs, and having filed an assignment of errors, said appeal having been heretofore allowed to the petitioner Lawrence E. Sexton as trustee as aforesaid, it is

Ordered that said appeal shall operate as a supersedeas of the decree herein of the 8th day of June 1909 and shall stay the execution of said decree pending such appeal upon the execution of a bond in the penalty of \$5000.

The American Surety Company is accepted as surety on said bond.
June 28, 1909.

E. H. LACOMBE.

Endorsed: U. S. Circuit Court of Appeals Second Circuit Lawrence E. Sexton as trustee in bankruptcy, appellee, against Kessler & Company, Limited, and another, appellants. John Larkin, attorney for trustee, 44 Wall Street, New York City. United States Circuit Court of Appeals Second Circuit Filed Jul- 1, 1909 William Parkin Clerk.

American Surety Company of New York.

Capital and Surplus. \$5,000,000.

Company's Office Building, 100 Broadway, New York.

Know all men by these presents, That, We, The American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, of #100 Broadway, Manhattan Borough, New York City, are held and firmly bound unto Kessler & Company, Ltd., and Frank Youatt, Liquidator, in the sum of Five Thousand Dollars (\$5,000), to be paid to the said Kessler & Company, Ltd., and Frank Youatt, Liquidator, for the payment of which, well and truly to be made, we bind ourselves, and our successors, firmly by these presents.

Sealed with our seals and dated the first day of July, in the year of our Lord, nineteen hundred and nine.

Whereas, lately at a term of the United States District Court, in and for the Southern District of New York, in a suit depending in said Court, between Lawrence E. Sexton, as Trustee in Bankruptcy of Kessler & Company, and of Alfred Kessler, Rudolf E. S. Flinsch and William K. Gillett, composing said Kessler and Company, Complainant, and Kessler and Company, Ltd., and Frank Youatt, Liquidator, defendants, a decree was rendered against the said defendants, setting aside the transfer of certain securities therein mentioned and described.

And, whereas, the said defendants have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, which Court has rendered a decree dated June 8th, 1909, and filed in the office of the Clerk of said Court on the 9th day of June, 1909, reversing the decree so as aforesaid appealed from and remanding the case to the District Court of the United States for the Southern

District of New York with directions to dismiss the bill of complaint, and the said complainant having prosecuted an appeal to the Supreme Court of the United States to reverse the said decree of the United States Circuit Court of Appeals for the Second Circuit, and said appeal having been allowed and a citation issued directed to said defendants citing and admonishing them to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now therefore the condition of this obligation is such, that if the said Lawrence E. Sexton as Trustee in Bankruptcy of Kessler and Company and of Alfred Kessler, Rudolf E. S. Flinsch and William K. Gillett, composing said Kessler and Company, shall prosecute said appeal to effect and answer all damages and costs if he fails to make his plea good, then this obligation shall be void, otherwise we, the above bounded American Surety Company of New York, shall do the same for him.

AMERICAN SURETY COMPANY
OF NEW YORK,
By HORACE P. HOLLISTER,
Resident Vice President.

Attest:

[L. s.] MARSHALL L. BROWER,
Resident Assistant Secretary.

Form C. 237. 2500-11-'08.

STATE OF NEW YORK,
County of New York, ss:

On this 1st day of July, 1909, before me personally appeared Horace P. Hollister, Resident Vice-President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in Mt. Vernon, N. Y.; that he is the Resident Vice-President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation; that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Horace P. Hollister further said that he is acquainted with Marshall L. Brower and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Marshall L. Brower subscribed to said instrument, is in the genuine handwriting of the said Marshall L. Brower and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Horace P. Hollister, Resident Vice-President.

[L. s.]

JARED F. HARRISON, JR.,
Notary Public, New York County.

STATE OF NEW YORK,
County of New York, ss:

Marshall L. Brower being duly sworn, says: That he is a Resident Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws. That said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, Stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than \$5,250,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

MARSHALL L. BROWER.

Subscribed and sworn before me this 1st day of July, 1909.

[L. s.]

JARED F. HARRISON, JR.,

Notary Public, New York County.

Form G 362.

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Company's Office Building, 100 Broadway, N. Y.

Financial Statement, March 31, 1909.

Resources.

Real Estate:

Home Office	
Building and	
Land, unen-	
cumbered . . .	\$3,000,000.00
N. Y. City Water	
Front, unen-	
cumbered . . .	166,047.91

\$3,166,047.91

Stocks and Bonds, Market Value . . .	2,925,183.83
Cash in Banks and Offices	838,220.54
Premiums in Course of Collection . .	288,799.02
Accrued Interest and Rents	32,137.20
Bills and Accounts Receivable	184,750.00

\$7,435,138.50

Liabilities.

Capital Stock.....	\$2,500,000.00	
Surplus	2,957,121.24	
Reserve for Re-Insurance.....	1,247,506.43	
Reserve for Contingent Claims.....	674,025.53	
Reserve for Contingent Expenses.....	25,000.00	
Bills and Accounts Payable, not due.....	31,485.30	
		<u>\$7,435,138.50</u>

In addition to the above Resources the Company owns:—

Real Estate—unencumbered—in various places, of the value of.....	\$63,175.00
Advances secured by Collateral.....	301,254.32
Deposits in suspended Banks (\$92,565.59), on which will be realized not less than.....	32,444.69
	<u>\$396,874.01</u>

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 20, 1909, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 15, 1908, for the purpose of nominating officers of the Company, * * * for the ensuing year beg leave to report as follows:

"We nominate for * * *

Place.	Resident Vice-Presidents.	Resident Assistant Secretaries.
New York, N. Y.	Richard Deming Horace P. Hollister	A. L. Adams Marshall L. Brower W. H. Bishop Horace P. Hollister H. H. Simpson

* * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and Counsel, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * *

STATE OF NEW YORK

County of New York, ss:

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 22nd day of January, 1909.

[L. s.]

F. J. PARRY,
Assistant Secretary.

Endorsed: Lawrence E. Sexton trustee in bankruptcy of Kessler & Company complainant against Kessler & Company, Ltd., and Frank Youatt Liquidator, defendants & respondents. Bond. Dated July first, 1909. Approved H. G. Ward July 8, 1909 United States Circuit Court of Appeals Second Circuit Filed Jul- 1 1909 William Parkin Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 1164 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Lawrence E. Sexton, as Trustee, etc. against Kessler & Company, Ltd., Frank Youatt, Liquidator, and J. & P. Coats, Ltd., as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 8th day of July in the year of our Lord One Thousand Nine Hundred and Nine and of the Independence of the said United States the One Hundred and thirty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

United States Circuit Court of Appeals for the Second Circuit.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillette, Composing the Firm of Kessler & Company, and of the said Kessler & Company, Complainant-Appellee,

against

KESSLER & COMPANY, LIMITED, and FRANK YOUATT, Liquidator, Defendants-Appellants.

Citation.

United States of America to Kessler & Company, Limited, and Frank Youatt, Liquidator, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the City of Washington in the District of Columbia thirty days after the date of this citation pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein Lawrence E. Sexton as trustee as aforesaid is appellee and you are appellants to show cause, if any there be, why the final decree entered against the said appellee on the 8th day of June 1909 as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 28th day of June, 1909 in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third.

E. H. LACOMBE,

*Judge of the United States Circuit Court
of Appeals for the Second Circuit.*

Service of this citation is acknowledged on behalf of appellants Kessler & Company, Limited and Frank Youatt, Liquidator, this 28th day of June, 1909.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,
Solicitors and of Counsel for Appellants.

[Endorsed:] U. S. Circuit Court of Appeals Second Circuit. Lawrence E. Sexton as trustee in Bankruptcy, Appellee, against Kessler & Company, Limited, and another, Appellants. Original citation. John Larkin, Attorney for trustee, 44 Wall Street, New York City. United States Circuit Court of Appeals, Second Circuit. Filed July 7, 1909. William Parkin, Clerk.

Endorsed on cover: File No. 21,756. U. S. Circuit Court Appeals, 2d Circuit. Term No. 530. Lawrence E. Sexton, as trustee in bankruptcy of Alfred Kessler, Rudolf E. F. Flinsch, and William K. Gillette, composing the firm of Kessler & Company, and of the said Kessler & Company, appellant, vs. Kessler & Company, Limited, and Frank Youatt, liquidator. Filed July 16th, 1909. File No. 21,756.

United States Supreme Court.

LAWRENCE E. SEXTON, as Trustee
in Bankruptcy of Alfred Kessler,
Rudolf E. F. Flinsch and Will-
iam K. Gillett, composing the
firm of Kessler & Company and
of said Kessler & Company.

Appellant,

against

KESSLER & Co., Limited, and
FRANK YOUATT, Liquidator,

Appellees.

**No. 530.
October Term,
1909.**

**Affidavit on
Motion to Ad-
vance on the
Calendar.**

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:
State and County of New York, }

FREDERICK C. McLAUGHLIN, being duly sworn,
deposes and says, I am a member of the firm of
McLaughlin, Russell, Coe & Sprague, the solicitors
for the above-named defendants-appellees and of
counsel for them in this court.

This is a suit by the Trustee in Bankruptcy above
named to set aside an alleged transfer as a voidable
preference.

The property involved is of the value of upwards
of two hundred and fifty-seven thousand dollars.
The defendant-appellee, Kessler & Co., Limited, an
English corporation, took possession before bank-

ruptcy of the property under a written agreement made four and one-half years before the bankruptcy, pursuant to which agreement said property had been set aside to secure said Kessler & Co., Limited, against its continuing acceptances of drafts and bills of exchange drawn on it by the firm of Kessler & Company of New York, now bankrupt, at all times aggregating about eighty thousand pounds.

Kessler & Co., Ltd., within two months prior to the bankruptcy of Kessler & Company of New York, accepted drafts drawn on it by the firm of Kessler & Company of New York in the aggregate amount of about three hundred and eighty-four thousand dollars. These drafts fell due shortly after the filing of the petition in bankruptcy against the New York firm on November 8th, 1907, in the District Court for the Southern District of New York.

The Bankruptcy Court immediately upon the filing of the petition issued an injunction preventing Kessler & Co., Ltd., defendant-appellee, from realizing upon its securities pending this suit, and as a direct and immediate result of this injunction, Kessler & Co., Ltd., were forced into a voluntary liquidation under the English Companies' Acts, Frank Youatt being named as Liquidator.

This liquidation has proceeded to the point where I am informed the creditors of the English corporation of Kessler & Co., Ltd., have been paid in cash fifty per cent. of their claims, including the creditors on the accepted bills drawn by the bankrupts on said Kessler & Co., Ltd., and the remaining assets in the hands of the Liquidator of the English corporation are just about sufficient to pay its creditors in full, leaving practically nothing for the shareholders.

The Circuit Court of Appeals for the Second Circuit unanimously decided in favor of the defendants

-appellees, and sustained their rights to the securities under their contract with the now bankrupts (*R.*, 1145, 1133, 1138, 1144). A more detailed statement of the facts of the case is contained in the opinion of *WARD, J.*, in the Circuit Court of Appeals, Second Circuit, *R.*, page 1133, an extract from which is hereto annexed, showing the agreement and circumstances under which the drafts were accepted and the securities set aside to protect them.

This litigation has been pending for nearly two years during which period Kessler & Co., Limited, has been enjoined as aforesaid. Its assets have been held by Mr. Youatt, as its Liquidator, who has been endeavoring to maintain it as a going concern and to pay off the creditors in full.

Its creditors are now clamoring for a sale of the remaining assets and final winding up of the business which has been in existence for almost one hundred years and never before has been in financial difficulties.

Unless a speedy hearing and determination of this appeal can be had, the ruin of this old established house will be complete, as the Liquidator will be forced to close down the business, sell its remaining assets, which consist of stocks of cotton and other merchandise and outstanding accounts all over the world, at a forced sale in order to pay the creditors in full leaving nothing to be handed back to the shareholders except a possible small equity in the preferred stock.

If, however, a speedy hearing and determination of this appeal be had and the unanimous decree of the Circuit Court of Appeals affirmed, the property which is the subject of this suit will be released by the dissolution of the injunctions herein and this property will be sufficient to satisfy the immediate demands of the creditors of Kessler &

Co., Ltd. The Liquidator then will be able to turn the business back to the shareholders as a going concern.

Prior to the liquidation forced by the injunction issued herein, Kessel & Co., Ltd., had a business extending to all parts of the world amounting to about five million dollars gross annually.

I am definitely informed by Mr. Youatt that the creditors of Kessler & Co., Ltd., cannot be held off much longer and that the only possible chance of preserving the business as a going concern and of restoring it to its shareholders is a speedy determination of this litigation in favor of the appellees, and that if the hearing is delayed until this case is reached in regular order he will be forced to wind up the business.

On the foregoing facts I respectfully submit that the defendants-appellees are entitled to all consideration consistent with the rules of this court to the end that a speedy hearing and determination of the appeal may be had and whatever relief they may be entitled to be granted before it is too late to save their business from ruin.

The complainant-appellant, the Trustee in Bankruptcy aforesaid, as appears by the consent of his solicitor and counsel Mr. John Larkin hereto annexed, joins in applying for the advancement of this appeal for hearing in this court as of the greatest importance also to him as such Trustee and the numerous creditors of the bankrupt estate, and the defendants-appellees make this motion to advance the appeal for hearing for the reasons above stated.

The transcript of the record herein has been duly docketed and filed and the appeal is duly on the calendar of this court as No. 530, October Term, 1909. The brief of the defendants-appellees is ready and I am informed that the brief of the complainant-appellant will be in a few days.

I therefore respectfully pray that an order may be made under the rules of this court advancing the case and directing it to be heard at an early date.

FREDERICK C. McLAUGHLIN.

Subscribed and sworn to before)
me 8th day of October, 1909.)

RUFUS W. SPRAGUE, JR.,
Notary Public,
New York County.

EXTRACT FROM STATEMENT OF FACTS BY WARD,
J., IN HIS OPINION RENDERED IN THE CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT (R.,
1133):

“Kessler & Company of New York, engaged in the business of banking and foreign exchange, had for a long time drawn upon Kessler & Co., Ltd., of Manchester, without giving any security for payment of its drafts. Early in 1903 the Manchester house wrote to the New York house as follows:

‘We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to provide this immediately, and as we in no way wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30 of June of this year, by which date the necessary securities should be set aside for us and a list sent to us. We do not propose to name a fixed amount of credit; suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced.

‘We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for.’

In accordance with this letter the New York house, on June 30, wrote the Manchester house:

‘In accordance with instructions from Mr. Alfred Kessler, we have to-day placed in a separate package in our safe deposit vault the following securities,

package marked 'Escrow for account of Kessler & Co., Limited, Manchester':

1484 shares Oklahoma Gas & Electric Co. at 25.....	\$37,100.00
2428 shares United Lighting & Heating Co. at 12.....	29,136.00
2352 shares Daimler Manufacturing Company at 50...	117,600.00
\$373,000 United Breweries Co. first 6's at 65.....	242,245.00
	<hr/> \$406,081.00

This escrow is intended as a protection against our long drawings against your good selves.

July 8, the Manchester house replied as follows:

'We are in receipt of your favor of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawing on us. We have noted the particulars as given up to us and the matter goes in order.

If at any time you have the opportunity of realizing the securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should, of course, like to see rather better quality.'

December 23, 1903, the Manchester house wrote to the New York house, as follows:

'For the purpose of the audit of our books for our yearly balance sheet, we should be obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against your drawing credit with us. We should like this done annually on the 31st of December.

We do not think the matter will pre-

sent any difficulty for you. Something in the form of the enclosed is what we require. * * *

We certify that we have specially set aside and hold for your acct. on this, the 31st day of December, '03, as security for the drawing credit which you accord us, the following securities.

Names, secs. and market value.'

The New York house not only conformed to these directions but in addition entered the securities so set aside and all substitutions of them on their loan book and notified the Manchester house of substitutions made from time to time. The securities were always either negotiable by delivery or endorsed in blank. The two houses did business in strict conformity with the foregoing arrangement until the fall of 1907 when a financial panic occurred in the City of New York.

October 25th the stability of the New York house being in doubt it delivered to an agent of the Manchester house then in New York City the escrow securities, which he deposited in a safe deposit company in the name of the Manchester house.

November 8 a petition in bankruptcy was filed against the New York house and November 27 it was adjudicated a bankrupt."

SUPREME COURT OF THE UNITED STATES.

LAWRENCE E. SEXTON, as Trustee
in Bankruptcy of Alfred Kessler,
Rudolf E. F. Flinsch and Will-
iam K. Gillett, composing the
firm of Kessler & Company,
* and of the said Kessler & Com-
pany,

*Complainant-Appellant,
against*

KESSLER & Co., Limited, and
FRANK YOUATT, Liquidator,
Defendants-Appellees.

Waiver of No-
tice of Mo-
tion and con-
sent to Ad-
vancement
of Case.

I, the undersigned, solicitor and counsel for the complainant-appellant, Lawrence E. Sexton as trustee in bankruptcy aforesaid, do hereby waive notice of motion to advance this case upon the calendar, and do hereby consent that this case may be advanced upon the calendar, if the Court shall in its discretion so decide, and that an order to that effect may be made by the Court setting the case for hearing on an early day not, however, prior to the second week in November, 1909.

Dated October 8th, 1909.

JOHN LARKIN,
Solicitor and Counsel
for Complainant-Appellant.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. **92**

Office Supreme Court U. S.

FILED

APR 18 1910

JAMES H. MCKENNEY,

Clerk.

LAWRENCE E. SEXTON, as Trustee in Bankruptcy, &c.

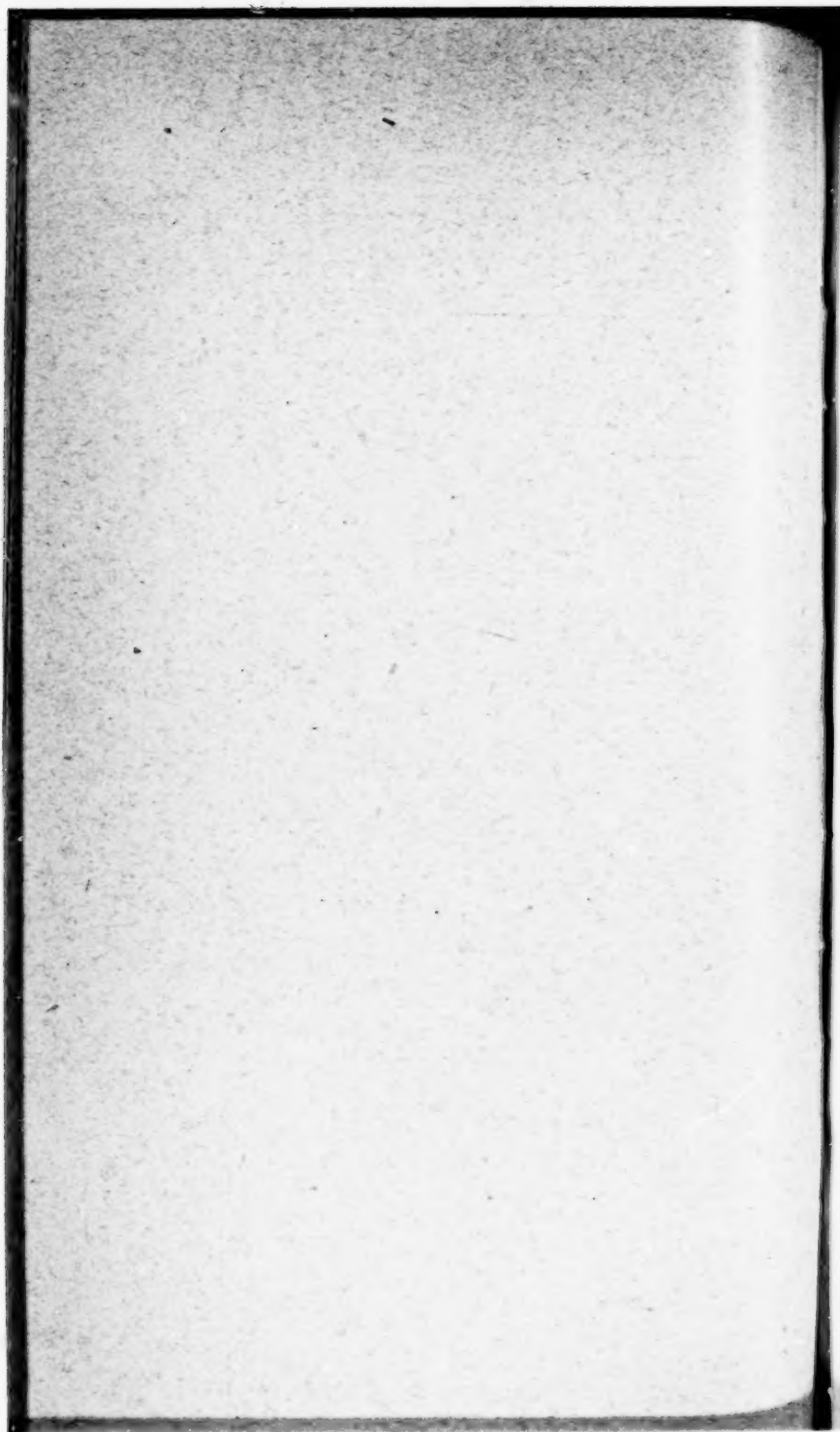
Appellant

against

KESSLER & COMPANY, Limited, et al.

MOTION OF JOHN GORLOW FOR LEAVE TO INTERVENE AND AFFIDAVIT OF JOHN GORLOW

HENRY WOLLMAN
KURNAL R. BABBITT
Counsel for John Gorlow



Supreme Court of the United States.

No. 530

LAWRENCE E. SEXTON, as Trustee
in Bankruptcy of Alfred Kessler,
Rudolph E. F. Flinsch and
William K. Gillett, composing
the firm of Kessler & Company,
and of said Kessler & Company,
Appellant,

Motion.
Notice of

vs.

KESSLER & COMPANY, Limited, and
FRANK YOUATT, Liquidator.

To:—

Lawrence E. Sexton, Esq., as Trustee in Bankruptcy of the Estate of Alfred Kessler, Rudolph E. F. Flinsch and William K. Gillett, composing the firm of Kessler & Co., and of said Kessler & Co., and John Larkin, Esq., his solicitor and counsel; Kessler & Co., Ltd., and Frank Youatt, as Liquidator of Kessler & Co., Ltd., and Messrs. McLaughlin, Russel, Coe & Sprague, Esqs., their solicitors and counsel:

You and each of you will please take notice that the undersigned petitioner, John Gorlow, on Monday, April 18, 1910, in the Court room of the above entitled Court in Washington, D. C., at the opening of said Court or as soon thereafter as counsel can be heard, on the accompanying affidavit of petitioner, John Gorlow, and on the accompanying brief, and on the printed Tran-

script of Record in the above entitled cause, being known as No. 530 in the United States Supreme Court, will move said Court for an order allowing said petitioner to intervene in the above entitled suit with reference to the 766 shares of the capital stock of the Cripple Creek Central Railway Co. referred to in the Printed Transcript of Record in the above entitled appeal, and which is the only stock of the Cripple Creek Central Railway Co. involved in this suit or appeal, and bringing in as parties to said intervention, Taylor, Smith & Evans, George F. Fry and Mrs Von Neufville, and directing the District Court for the Southern District of New York, or some Master or Commissioner to be appointed by this Court, to hear the claim of this petitioner to said stock, and in case said District Court is directed to hear said intervention, either to report to this Court with reference thereto, or itself to determine the issues; and if a Commissioner is appointed, then such Commissioner shall be directed to take the testimony and report to this Court with reference to the law and facts; and will move this Court further for such other or further order as shall be equitable, just and proper in the premises.

Dated, New York, April 1, 1910.

HENRY WOLLMAN,
Solicitor for Petitioner
John Gorlow,
20 Broad Street,
New York City.

HENRY WOLLMAN,
KURNAL R. BABBITT,
of Counsel.

Supreme Court of the United States.

LAWRENCE E. SEXTON, as Trustee
in Bankruptcy of Alfred Kessler,
Rudolph E. F. Flinsch and
William K. Gillett, composing
the firm of Kessler & Company,
and of said Kessler & Company,

Appellant,

vs.

KESSLER & COMPANY, Limited, and
FRANK YOUATT, Liquidator,

No. 530.

AFFIDAVIT OF JOHN GORLOW.

STATE OF NEW YORK,)
County of New York.) ss.:

JOHN GORLOW, being duly sworn, deposes and says:

That during all the times hereinafter referred to, the above named Alfred Kessler, Rudolph E. F. Flinsch and William K. Gillett were partners in the banking business at No. 54 Wall Street, in the City of New York, under the name of Kessler & Co. That for a long time before and on October 25, 1907, Frank E. Hagemeyer, Taylor, Smith & Evans, W. J. Matheson, George F. Fry, Johann Goll & Söhne, Oliver Gildersleeve Mrs. E. Von Neufville, Deichman & Co., Bank für Handel & Industrie, F. W. Shibley & Co., A. H. Hagemeyer, Karl C. Schuyler, George E. Lindley, Charles M. MacNeill, Frederick Ayer, Charles

F. Ayer, Spencer Penrose and Henry M. Blackmer, (all of whom together may for convenience be hereinafter designated as "said owners"), were the owners of 466 shares of the preferred stock and 300 shares of the common stock of the Cripple Creek Central Railway Company, a corporation, and of the certificates representing the same, and that said stock and said certificates are the same stock and the same certificates involved in this, the above entitled suit and appeal in this Court, No. 530.

Your petitioner further states that said stock and stock certificates were deposited by "said owners" with Kessler & Co., bankers, as aforesaid, as custodians and without any power or authority on the part of said Kessler & Co. to transfer or dispose of the same.

That on or about October 23, 1907, said Kessler & Co., without any right or authority, transferred and delivered the certificates representing said 766 shares of stock to Kessler & Co., Limited, of Manchester, England, a corporation of Great Britain.

That on or about November 8, 1907, Kessler & Co. were adjudicated bankrupts in a bankruptcy proceeding pending in the United States District Court, for the Southern District of New York. That Lawrence E. Sexton was appointed receiver and subsequently was appointed Trustee in bankruptcy of the co-partnership estate of said Kessler & Co. and of the estates of the individual partners and that said Sexton is now such Trustee. That the corporation of Kessler & Co., Ltd., was on or about November 18, 1907, placed in liquidation and that Frank Youatt, a citizen of Great Britain, was appointed and is Liquidator of said corporation. That said Kessler & Co., Ltd., and said Youatt, Liquidator, entered into the

aforesaid bankruptcy proceedings of Kessler & Co., and filed a paper setting forth that said Sexton, then receiver of Kessler & Co., was claiming said 766 shares of Cripple Creek Central Railway Co. stock, together with nearly Two million dollars of other securities which had been transferred to Kessler & Co., Ltd., and asking that said Sexton be required to formulate his claim, and that the same be sent to a Special Commissioner for determination. A copy of said paper so filed by said Kessler & Co., Ltd., and Youatt, Liquidator, is set forth at pages 2 to 10 of the Printed Transcript of Record in the above entitled appeal.

That thereupon issues as between said Sexton and said Kessler & Co., Ltd., and Youatt were framed. Said Sexton claimed said property on the ground that the transfer by Kessler & Co. to Kessler & Co., Ltd., was a preference in violation of the Bankruptcy Act, which was denied by said Kessler & Co., Ltd., and said Youatt, Liquidator. A copy of the claim of said Sexton and the answer thereto of said Kessler & Co., Ltd., and Youatt appears on pages 12 to 19 of said Transcript.

That thereafter, the issues between said Sexton, Trustee, and said Kessler & Co., Ltd., and said Youatt, were tried before Peter B. Olney, Esq., Referee in Bankruptcy, who was appointed Special Master to determine the same. That said Olney reported to said District Court in favor of awarding all said property to said Sexton, Trustee (pp. 998 to 1064 of said Transcript). That the District Court affirmed the report of said Olney and entered a decree in favor of Sexton, Trustee (pp. 1095 to 1104 of said Transcript). That in order to obviate the necessity of giving

an appeal bond, said Kessler & Co., Ltd., and said Youatt, Liquidator, by an order of said District Court, were required to deliver said Cripple Creek Central Railway Co. stock and all the other securities involved in said contest, to said Sexton, Trustee, to be held by him as an officer of the Court, authorizing him to collect the interest and dividends on the various securities and hold the same as an officer of the Court. A copy of said order appears on pages 1109 to 1112 of said Transcript. That Kessler & Co., Ltd., and said Youatt, Liquidator, did deliver the certificates of said Cripple Creek Central Railway Co. stock and all said securities to said Sexton as an officer of said Court, and that he now holds the same as such officer. That thereafter the decree of said District Court was reversed by the Circuit Court of Appeals of the Second Circuit, and thereafter a supersedeas was granted and said cause appealed by said Trustee, to this Court (pp. 1112 to 1155 of said Transcript) and that the same is this, the above entitled cause, No. 530.

That there were quite a number of persons outside of "said owners" who claimed an interest in or lien upon said Cripple Creek Central Railway Co. stock, and that all of said parties making such claims, not, however, including Kessler & Co., Ltd., and Youatt, Liquidator, released to "said owners" all claims against such stock, and thereupon they entered into an agreement with each other, signed by all of said parties, in the nature of a proposition, addressed to said Sexton as Trustee in Bankruptcy of Kessler & Co., in which agreement the parties hereinbefore designated as "said owners" were designated as the "paid up participants", and in which the Lawyers' Title Insurance & Trust Co. of New York is designated as "said Lawyers'

* * * * Trust Co." The following statements are made in said agreement with reference to said 766 shares of Cripple Creek Central Railway Co. stock: "All said stock delivered to Kessler & Co., Ltd., Manchester, as aforesaid, belongs to the 'paid up participants'. In the event of its recovery by you (The Trustee) in any suit or proceeding, said stock in the hands of Kessler & Co., Ltd., shall be delivered by you, said Trustee, to said 'Lawyers' * * * Trust Co.' for said 'paid up participants' as, if and when the same shall be received by you, but this shall not affect or impair the right of said 'paid up participants' to bring such suits or proceedings against others than those agreed to be released under the provisions hereof, for the recovery of said Kessler & Co., Ltd., stock, or such suits or proceedings with reference to said stock or their claims in or growing out of the same as they or any of them shall deem proper."

That after the finding of said Olney, as Master, in this proceeding, said parties presented said agreement to said Bankruptcy Court having charge of said estate and said agreement was approved by said Bankruptcy Court, September 16, 1908.

That thereafter all "said owners" of said Cripple Creek Central Railway Co. stock, except Taylor, Smith & Evans, George F. Fry and Mrs. E. Von Neufville, assigned to your petitioner, John Gorlow, all of their interests in said 766 shares of Cripple Creek stock, and the certificates representing the same.

That thereafter, on or about November 17, 1909, your petitioner gave notice to all the parties hereto that he would on November 22, 1909, make application to said District Court for leave to intervene in said proceeding to ob-

tain said Cripple Creek Central Railway Co. stock.

That at the hearing of said application, said Sexton, Trustee, and said Kessler & Co., Ltd., and said Youatt, Liquidator, appeared. That United States District Judge Hough, before whom said application to intervene was made, denied the same and rendered the following opinion:

"On motion by John Gorlow for leave to intervene.

"One of two propositions is certainly true:

"1. Either this Court is now without any jurisdiction to make any order in this case; or 2: The only order that it can make at present (if appeal to the Supreme Court were discontinued) is to execute the mandate of the Circuit Court of Appeals.

"There may be a *tertium quid* on the consent of parties, but not otherwise. The Court may have power at present to direct a lawful order to the custodian of the property which is the subject of this action.

"None of these powers do Mr. Gorlow the slightest good.

"The motion is denied, with leave to renew in the event only of the ultimate order of the Supreme Court of the United States conferring upon this Court any further powers than those above enumerated in respect of this cause."

Thereupon an order was entered denying said application in the following words:

"Ordered that said motion be and the same hereby is denied with leave to renew in the event only of the ultimate order of the Supreme Court of the United States conferring upon this Court power to entertain said motion."

Your petitioner is informed by his counsel, Henry Wollman, Esq., who was counsel for the greater part of "said owners" from about the time the bankruptcy proceedings were begun against Kessler & Co., that Kessler & Co., Ltd., and also the New York counsel of Kessler & Co., Ltd., and of the Liquidator of said corporation, knew at the time said bankruptcy proceedings were begun, if they did not know it before that, that all "said owners" claimed to own said Cripple Creek stock then in the possession of Kessler & Co., Ltd.

JOHN GORLOW.

Subscribed and sworn to before
me, a Notary Public in and
for the County of New York,
in the State of New York, the
30th day of March, 1910.

Milton G. Buckey,
Notary Public,
Kings County.

Certificate filed in New York County, N. Y.
(Notary's Seal.)

Supreme Court of the United States.

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E.
F. FLINSCH and WILLIAM K.
GILLETT, composing the firm
of Kessler & Company,
Bankrupts.

LAWRENCE E. SEXTON, as Re-
ceiver in Bankruptcy of Al-
fred Kessler, Rudolf E.
F. Flinsch and William K.
Gillett, composing the firm
of Kessler & Company, and
the said Kessler & Company,
Appellant,

AGAINST

KESSLER & COMPANY, Limited,
and FRANK YOUATT, Liqui-
dator,

Respondents.

Office Supreme Court, U. S.
FILED.

APR 16 1910

JAMES H. MCKENNEY.

Oct. Term, 1909.

No. ~~2223~~ 92

BRIEF ON BEHALF OF TRUSTEE IN BANK- RUPTCY IN OPPOSITION TO GORLOW'S MOTION TO INTERVENE.

This cause has been tried and several thousand pages of evidence have been taken. The District Court has passed judgment upon the issues, the Cir-

cuit Court of Appeals has passed judgment upon the issues, and the case is now before this Court upon appeal.

The present attorney for the petitioner had personal knowledge of the litigation between the parties hereto as early as November, 1907, at which time he represented the "Syndicate" of claimants to the property set forth in the petition. Gorlow, the present petitioner, knew of the litigation, as did several other members of the syndicate.

Notwithstanding this, they have allowed the litigation to proceed for two and a half years without taking any step to become a party thereto.

If there is any power in this Court to grant the order prayed for the motion should be denied because of laches.

If Gorlow were allowed to intervene in this court, what would follow? Would he intervene only on the record as it stands, and proceed as a sort of *amicus curiæ* to assist the Court in determining whether Henry Kessler obtained an invalid preference when on October 25, 1907, he possessed himself of the securities? Clearly not:

Northern Securities Co. v. U. S., 191
U. S., 555,

for the intervention would be useless, as Gorlow's claim is expressly asserted as hostile and superior to both appellant's and respondents', and (Gorlow's Brief, p. 2), "his title to the stock cannot be affected in the slightest by the decision which will be rendered by the Court in this case." Why then should he be allowed to interfere if the decision cannot affect him?

If Gorlow intervene will this Court order a reference or take testimony on his claims?

Clearly not, because the jurisdiction of this Court is appellate only, and is to determine whether the facts as found by the Referee, adopted by the District Court, and not disturbed by the Court of Appeals, require a decree in favor of the appellant or of the

respondents. In that question of law Gorlow has no interest.

We have searched in vain to find a case where a claimant was in the manner now suggested, allowed to intervene in an appeal to this Court. The application should be made to the court of original jurisdiction, and upon appeal this Court will consider the propriety of its disposition.

French v. Gates, 105 U. S., 509.

Krippendorf v. Hyde, 110 U. S., 276.

Bryan v. Bernheimer, 181 U. S., 188,
198.

The Bankruptcy Act, Sec. 2, Sub. 7, invests courts of bankruptcy (there enumerated, omitting reference to this court) with power to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided"; and thereunder claimants to property in possession of the bankruptcy court are allowed to intervene *in that court* and try out title to the property:

Re Whitever, 105 F. R., 180, and cases cited in 1 Fed. Stat. Ann., 534*n*.

But if they do not make timely application, intervention will not be allowed.

Smith v. Gale, 144 U. S., 509.

And if there is no intervention the would-be intervenor's rights are in no way affected by the Court's determination:

Hook v. Payne, 14 Wall., 252.

Smith v. Gale, 144 U. S., 509.

On the question of laches the words of this Court in

Ward v. Sherman, 192 U. S., 168,
176-7;

Gallihier v. Cadwell, 145 U. S., 368, 373;

Penn Mutual, &c., v. Austin, 168 U. S.,
685;

are apt. Gorlow was either entitled or not entitled to intervene in this controversy. Had he made a timely application to the District Court, and been allowed to intervene, all his evidence could have been taken and concluded more than two years ago in the one reference. If he intervenes now and here, the appeal records we have prepared at great labor and expense will be superseded, the expenses of a new reference will largely exceed the cost in the former reference of determining Gorlow's claim, and the settlement of the controversy between Sexton and Kessler, Ltd., will be indefinitely postponed, although Gorlow makes no claim to two-thirds of the subject matter of that controversy.

We have examined the cases cited by the petitioner as authority for making the application to this Court, and cannot find in them any support for his position. They distinctly recognize the District Court, even where appeal and supersedeas have been effected, as the proper place for an application affecting matters not before the appellate court:

Spring v. Insur. Co., 6 Wheat., 519
(selling the *res* and investing the proceeds).

Hovey v. McDonald, 109 U. S., 150
(punishing violations of an injunction pending appeal therefrom).

Fuller v. Butler, 182 U. S., 562 (granting new trial pending appeal from judgment).

Natal v. Louisiana, 123 U. S., 31.

In his application to the District Court Gorlow well observed that "the jurisdiction of this [the District] Court over that property has not been removed to the United States Supreme Court. All that has been removed to the Supreme Court is a single controversy with reference thereto"; unless so, "an appeal on any one of say a dozen claims paralyzes the power of this [the District] Court to adjudicate

any other claim and robs the Court of 'jurisdiction to hear and determine all questions relating to the title, possession or control of the property' (Murphy v. Hoffman, 211 U. S., 154), or, in other words, an appeal on one question deprives the court of jurisdiction over all other questions relating to the property."

The motion should be denied because:

1. Made to the wrong court;
2. Of petitioner's laches;
3. By his own showing he cannot be interested in the determination of this appeal.

April 18, 1910.

Respectfully submitted,

JOHN LARKIN,
Attorney for Appellant.

APR 16 1970

JAMES H. MCKENNEY,

SEC. 790-1

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. ~~1003~~ 92

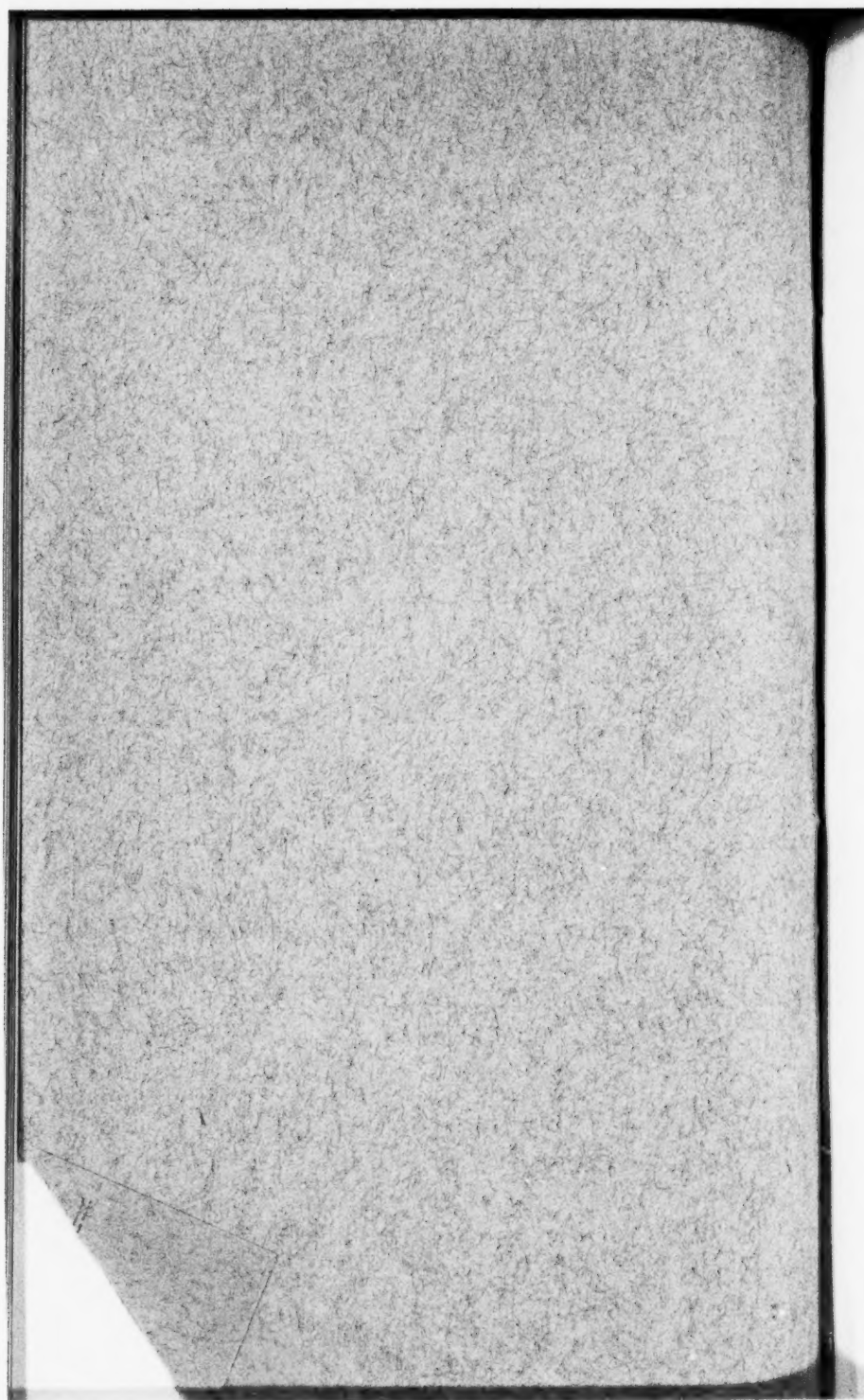
LAWRENCE E. SEXTON, AS TRUSTEE IN BANKRUPTCY, &C.,
Appellant,

against

KESSLER & CO., LTD., ET AL.,
Respondents.

AFFIDAVIT OPPOSING APPLICATION OF
JOHN GORLOW TO INTERVENE.

JOHN LARKIN,
Counsel for Appellant.



Supreme Court of the United States. ¹

IN THE MATTER

OF

ALFRED KESSLER, RUDOLF E. F.
FLINSCH and WILLIAM K. GILLETT,
composing the firm of Kessler &
Company, Bankrupts.

LAWRENCE E. SEXTON, as trustee in
bankruptcy of Alfred Kessler, Rudolf
E. F. Flinsch and William K. Gillett,
composing the firm of Kessler &
Company, and the said Kessler &
Company,

Appellant,

AGAINST

KESSLER & COMPANY, Limited, and
FRANK YOUATT, Liquidator,
Respondents.

No. 530.

2

3

Affidavit of John Larkin in Opposi- tion to Gorlow's Motion to Inter- vene.

STATE OF NEW YORK, { ss.:
County of New York, }

JOHN LARKIN, being duly sworn, says that he re-
sides in the City of New York, and is a member of

4 the bar of this Court. As solicitor for the petitioning creditors, deponent filed the petition in November, 1907, for adjudication of bankruptcy against Kessler & Co., and has acted as solicitor and counsel for the Receiver and for the Trustee in all the steps of this controversy since it was commenced before Peter B. Olney, Esq., the Referee in bankruptcy, continued before him as Master, came before the U. S. District Court on exceptions to his report, and before the Circuit Court of Appeals, 2d Circuit, on appeal, and is now counsel for the trustee in this Court herein.

The facts and circumstances out of which this controversy arose were briefly as follows:

- 5 For many years prior to 1907 the banking house of Kessler & Co., of New York (the bankrupt co-partnership), had had certain dealings with the Manchester, England, house of Kessler & Co., Ltd. (the respondent), and the Kesslers of each concern were members of a common family. These dealings consisted chiefly of the New York house selling drafts for 60 or 90 days (called "long drawings") upon the English house, and remitting funds to England before maturity to meet those drafts. The method of "securing" the English house for their acceptance of these drafts was for the New York house to set apart in an envelope or bundle (marked "Manchester escrow") certain of
- 6 their securities of various kinds, which always remained in the possession of the New York house and in their safe, and which were sold or hypothecated from time to time, and for which other securities were substituted, and were, in short, dealt with by the New York house just as freely as if the English house had not existed.

October, 1907, was the time of the financial panic in New York City and elsewhere, and during that month Henry Kessler, the head of the English concern, arrived in New York; after consulting with counsel he went to the New York house on October

25, 1907, and from it obtained possession of the 7 securities, then in the said envelope marked "Manchester escrow." Those securities included, among others, certain shares of stock in the Cripple Creek Central Ry. Co., which are the subject of the present application by Gorlow to intervene.

On October 30, 1907, the New York house assigned for the benefit of creditors, and immediately meetings were called and were held almost daily between the assignee, Mr. Williams, and Henry Kessler and his associates, and various persons represented by Henry Wollman, Esq., who were creditors of and claimants against the New York house for the said Cripple Creek shares.

The principal object of these meetings was to arrange that the English house should turn back the 8 securities which it had (as was declared) illegally seized, and thereupon to arrange with the assignee, Mr. Williams, for the disposition of a part of these securities in accordance with the desires and claims of the so-called Cripple Creek Railway Syndicate, which was composed of Henry M. Blackmer, president of the Cripple Creek Central Railway, and others, all represented by Henry Wollman, Esq. One of the most active participants in these conferences was the said Henry Wollman, Gorlow's counsel herein, who represented the members of the syndicate. These conferences were frequent for about two weeks and when it became apparent that 9 no agreement could be reached and that Mr. Kessler of the English House was about to depart with the securities in his possession, a petition in bankruptcy against the New York House and its individual members was filed. One of the three petitioning creditors was the Cripple Creek Central Railway, which executed and verified the same by John Gorlow, its secretary and treasury who now makes this application. When the petition was filed Lawrence E. Sexton was appointed temporary re-

10 ceiver and Henry Kessler was stayed from removing or disposing of the securities. The English House thereupon made a summary application to the U. S. District Court to determine the rights of the English House in the securities taken, and the matter was referred to Peter B. Olney, Esq., the referee in bankruptcy, and a petition and answer were filed with him and thereupon hearings began before him on November 26th, 1907, and continued sometimes from day to day, sometimes at frequent intervals and sometimes all day long for a period of about three months and a half, or until the middle of March, 1908.

The office of secretary and treasurer of the Cripple Creek Central Railway is filled by Mr. Gorlow, the petitioner. Almost continually during the progress of the hearings before the Referee deponent and others in his office were in communication with Mr. Gorlow and the Cripple Creek Railway, and with Mr. Wollman, the attorney for the syndicate, and who now appears for Mr. Gorlow as assignee of the members of said syndicate; and at all times he and the other parties mentioned herein were familiar with the course of the proceedings before the Referee. After some evidence had been taken, one J. & P. Coates, Limited, made application to the District Court to intervene, claiming superior rights to a part (other than the Cripple Creek Railway stock) of the securities; that application was granted, but only upon the express condition that it should be without prejudice to the proceedings already had before the Referee, and that all testimony and exhibits in the case should remain, and that the hearings should continue without any delay whatever or prejudice by reason of the intervention. But during all this time, although aware of the course of proceedings and the intervention of J. & P. Coates, Limited, neither Gorlow nor any of his assignors made any move to intervene. The testimony and

exhibits in this case are very voluminous; the record 13
in the Circuit Court of Appeals consisting of between
1,100 and 1,200 printed pages.

The Referee sustained the receiver and trustee's
position, holding that the delivery to Henry Kessler
was a preference invalid under the bankruptcy act,
and set it aside; and the District Court overruled all
exceptions to the Referee's report and entered a
decree setting aside the preferential transfer.

Even then no application to intervene was made;
after the appeal by the English House from said
decree, the very voluminous record was printed at a
very large expense and elaborate briefs consisting of
over 200 printed pages were submitted and the argu-
ment before the Circuit Court of Appeals consumed 14
nearly two days. Not until the Court of Appeals
had reversed the decree, dismissed the trustee's claim,
and the mandate had been entered in the District
Court and an appeal to this Court had been taken,
and assignments of error and supersedeas filed, and
the record on appeal in this Court printed and filed,
did Gorlow apply to intervene. He then made his
application to the District Court, which was denied
in the manner as stated in the moving papers,
page 8.

Defendant submits that the petitioner is not now
entitled to intervene. The evidence is all in and the
case has been closed, and judgments of two courts
have been rendered upon the issues raised by the 15
parties to the proceeding. The order of the District
Court denying the petitioner's motion to intervene
sufficiently safeguards his rights, as upon the de-
termination of the question of ownership as between
the parties to the pending proceeding, the petitioner
Gorlow may maintain against the successful party
a plenary or summary action to determine the ques-
tion of his ownership to the property in question, or
may renew his application to the District Court for
leave to intervene after the decision by this Court,

16 which right was expressly conferred upon him by order of said Court when his motion to intervene was denied.

Wherefore deponent asks that the application be denied.

JOHN LARKIN.

Subscribed and sworn to before
me, a Notary Public, in and
for the State and County of
New York, this 15 day of
April, 1910.

RALPH S. HULL,
Notary Public,
New York County.

(LS)

Supreme Court of the United States.

LAWRENCE E. SEXTON, as Trustee
in Bankruptcy of ALFRED KESS-
LER, RUDOLF E. F. FLINSCH and
WILLIAM K. GILLETT, compos-
ing the firm of Kessler & Com-
pany and of said Kessler &
Company,

Appellant,

against

KESSLER & Co., Limited, and
FRANK YOUATT, Liquidator,
Appellees.

October Term,
1909.
No. 530.

2

Affidavit in Opposition to Motion of John Gorlow for Leave to Intervene *pro* *interesse suo.*

3

UNITED STATES OF AMERICA,
Southern District of New York, }
City, County and State of New York, } ss.:

RUFUS W. SPRAGUE, Jr., being duly sworn, de-
poses and says :

First.—He is a member of the firm of McLaugh-
lin, Russell, Coe & Sprague, the solicitors of
record in the above-entitled cause for the appel-
lees, Kessler & Co., Limited, a corporation of
Manchester, England, and Frank Youatt, Liqui-

- 4 dator thereof, and of counsel for them in this Court. He is acquainted with the facts herein and makes this affidavit, as neither said Frank Youatt, Liquidator, nor any officer or agent of said Kessler & Co., Limited, capable of making this affidavit, is now within the United States.

Second.—Deponent denies the allegations in the affidavit of John Gorlow in the motion papers on pages 3 and 4 thereof that on October 25th, 1907, Frank E. Havemeyer and the other persons mentioned were the “owners” of four
5 hundred sixty-six (466) shares of preferred stock and three hundred (300) shares of common stock of the Cripple Creek Central Railway Company and of the certificates representing the same, and that the said stock and said certificates are the same stock and the same certificates involved in this cause and alleges that said certificates were lawfully deposited with the appellees by the bankrupts as security for advances.

Third.—Deponent denies the allegations in the affidavit of said Gorlow set forth on page 4 of the
6 moving papers, that said stock and said stock certificates were deposited by “said owners” with Kessler & Company, bankers, as custodian, and without any power or authority on the part of Kessler & Company to transfer or dispose of the same.

Fourth.—Deponent denies the allegations contained in the affidavit of said Gorlow set forth on page 4 of the moving papers, that on or about October 25th, 1907, Kessler & Co., without any right or authority transferred and delivered the certificates representing said seven hundred sixty-six (766) shares of stock to Kessler & Co., Limited, of Manchester, England.

Fifth.—Deponent denies each and every allegation contained in the last paragraph of the affidavit of said Gorlow set forth on page 9 of the moving papers, except that deponent admits that on or about November 8th, 1907, the claim to the ownership of the seven hundred sixty-six (766) shares of Cripple Creek stock, referred to in said affidavit, was made against Kessler & Co., Limited, and later against the Liquidator of said corporation, and that demand for the surrender of said stock was made on or about that time by Henry Wollman, Esq., counsel for the petitioner herein and others, which demand was refused. 7 8

Sixth.—From the time of such refusal, on or about November 8th, 1907, until on or about November 17th, 1909, after this cause came regularly on the calendar of this Court on appeal, neither the said Gorlow nor any of his alleged assignors, nor any of the alleged "owners," nor any other person, made any motion or took any steps in this cause or otherwise for the enforcement of the claim alleged in Gorlow's affidavit against this Cripple Creek stock. 9

Seventh.—The said certificates of Cripple Creek stock, together with the other property which the appellant sought to recover in this suit, were on or about the 25th day of October, 1907, placed in a safe deposit box in the vaults of the Hanover Safe Deposit Company in the City of New York, and the said certificates of Cripple Creek stock have since remained and are now in the said safe deposit box.

Eighth.—Deponent denies the allegations contained in said affidavit of Gorlow set forth on pages 4 and 5 of the moving papers that this cause is

- 10 part of the bankruptcy proceedings of Kessler & Company, and that the issues herein were tried before Honorable Peter B. Olney, as Referee in Bankruptcy, or as Special Master, to determine the same, and alleges that this cause is a plenary suit in equity presenting new and independent issues (see Transcript of Record, p. 40).

- Ninth.*—Deponent denies the allegations contained in said affidavit of Gorlow, set forth on pages 5 and 6 of the moving papers, that the order therein, which appears in the transcript of record, pages 1109,
 11 1112, was made in order to obviate the necessity of an appeal bond, and alleges that said order was entered on the 14th day of December, 1908, at the foot of the decree herein of the District Court for the Southern District of New York, entered on the 4th day of December, 1908, on the motion of the appellees herein and with the consent of the appellant for the purpose of restraining the appellant from disposing of the property therein mentioned pending the appeal to the Circuit Court of Appeals, Second Circuit, without the consent of the appellees, and to lessen the amount of the bond which
 12 would be required to obtain a supersedeas of said decree of December 4th, 1908, which supersedeas was afterwards granted (see Transcript of Record, p. 1122).

Tenth.—The appellees, Kessler & Co., Limited and Frank Youatt, Liquidator, were not parties to the agreement set forth in the affidavit of said Gorlow on pages 6 and 7 of the motion papers.

Eleventh.—The mandate of the Circuit Court of Appeals on its decree of reversal (Transcript of Record, p. 1145) was filed in the District Court for the Southern District of New York, and a final decree dismissing the bill of complaint on the merits

was entered on said mandate in said District Court 13
on or about July 6, 1909.

Twelfth.—Deponent denies that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in the affidavit of said Gorlow set forth on page 7 of the moving papers that all of “said owners” except certain persons therein named assigned to the petitioner, John Gorlow, their interests in said seven hundred sixty-six (766) shares of Cripple Creek stock and the certificates representing the same.

RUFUS W. SPRAGUE, Jr. 14

Subscribed and sworn to }
before me this 15th day }
of April, 1910. }

ROBERT P. SMITH,
Notary Public,

[NOTARY'S SEAL.] Westchester County,
New York.

Certificate filed in New York County, N. Y.

FILED.
APR 16 1910

JAMES H. MCKENNEY

Supreme Court of the United States.

LAWRENCE E. SEXTON, AS TRUSTEE
IN BANKRUPTCY OF ALFRED KESS-
LER, RUDOLF E. F. FLINSCH
AND WILLIAM K. GILLET, COM-
POSING THE FIRM OF KESSLER &
COMPANY AND OF SAID KESSLER
& COMPANY,

Appellants,

against

KESSLER & CO., LIMITED, AND FRANK
YOUATT, LIQUIDATOR,

Appellees.

No. ~~2000~~ 8

October Term,
1909.

APPELLEES' BRIEF IN OPPOSITION TO JOHN CORLOW'S MOTION TO INTERVENE, ETC.

ABRAM I. ELKUS,
FREDERICK C. McLAUGHLIN,
RUFUS W. SPRAGUE, Jr.,

Counsel.

Supreme Court of the United States.

LAWRENCE E. SEXTON, as Trustee
in Bankruptcy of ALFRED KESS-
LER, RUDOLF E. F. FLINSCH and
WILLIAM K. GILLETT, compos-
ing the firm of Kessler & Com-
pany and of said Kessler &
Company,

Appellants,

against

KESSLER & Co., Limited, and
FRANK YOUATT, Liquidator,
Appellees.

October Term
1909.
No. 530.

APPELLEES' BRIEF IN OPPOSITION TO JOHN GORLOW'S MOTION TO IN- TERVENE, ETC.

Nature of Principal Suit.

This cause (Number 530, October Term, 1909), is an appeal from a decree entered on a unanimous decision of the United States Circuit Court of Appeals for the Second Circuit, on June 9, 1909, reversing a decree in equity of the United States District Court for the Southern District of New York, entered on December 4, 1908.

On November 8th, 1907, a petition in bankruptcy was filed against the New York copartnership of Kessler & Company and its individual members under which an adjudication of bankruptcy was had and the appellant appointed trustee.

At the time the petition was filed the appellee Kessler & Co., Ltd., an English corporation with its principal place of business at Manchester, England, of which the appellee Frank Youatt is now the liquidator in voluntary liquidation, had accepted drafts drawn on it by the bankrupts and sold by the bankrupts in New York to the amount of about £80,000, which were then outstanding (Transcript, pp. 1037, 1039).

As security to the appellee for this liability (on which the appellees have so far paid seventy-five per cent.) the bankrupts had set aside certain stocks, bonds, notes, certificates and real estate deeds, which it held as the property of the appellee, and which are referred to throughout the correspondence between the Manchester and New York concerns as the "Escrow" and "Special Escrow" of Kessler & Co., Ltd. (Transcript, p. 1005 ff, p. 1133).

On October 25, 1907, a few days before the bankruptcy petition was filed, the actual possession of these so-called "Escrows" was given over by the bankrupts to the said appellee, pursuant to the written agreement under which they had been set aside since June, 1903 (Transcript, pp. 1005, 1015, 1134).

The appellant as trustee in bankruptcy immediately brought a plenary suit in the said United States District Court against the appellees, alleging that this delivery on October 25, 1907, was a voidable preference, and praying that it be set aside and the property turned over to him as Trustee. *This was the ordinary suit under Section 60 of the*

Bankrupt Act, as amended in 1903 (Transcript, pp. 40, 41, 42).

At the beginning of the suit, in fact immediately upon the filing of the petition on November 8, 1907, the appellees were enjoined from disposing of the property.

The issues were referred to a Master in Chancery to take the testimony and report (Transcript, pp. 40, 41, 42). His report was filed on April 30, 1908, in favor of the appellant (Transcript, p. 998). This report was confirmed by the District Court, and a decree was entered in that Court on December 4, 1908, setting aside said alleged transfer and directing the appellees to turn over the property to the appellant as trustee (Transcript, p. 1095).

An order, dated December 14, 1908, was entered at the foot of this decree, directing the appellant to hold the property where it then was pending the appeal which was taken by the appellees to the Circuit Court of Appeals for the Second Circuit (Transcript, p. 1109).

Appeal by the appellees to the Circuit Court of Appeals resulted in a unanimous reversal, Circuit Judges Ward and Noyes writing separate opinions, and Circuit Judge Lacombe concurring with Judge Noyes. The appellant has, as above stated, appealed to this Court. The cause has been on the calendar of this Court since July 16, 1909.

Not an action *in rem*.

The United States District Court never assumed jurisdiction over the property which is the subject of this suit, further than to enjoin the appellees from disposing of the same. The action was *in personam*. The relief demanded was that the alleged transfer be set aside and that the appellees turn over the property. The decree (Trans-

cript, p. 1095) in the District Court (now reversed) followed this prayer for relief.

This cause is a plenary suit in equity originating in a District Court, commenced by the appellant, as Trustee aforesaid, to recover personal property in the possession of the appellees on the ground of an alleged transfer to the appellees by the bankrupts of said property, constituting a voidable preference. It is therefore not a bankruptcy proceeding but is a suit involving independent issues and claims of title.

Hewitt vs. Berlin Machine Works,
194 U. S., 296;

Knapp, as Trustee, vs. Milwaukee Trust Co., opinion rendered March 7th, 1910, No. 206, October Term, 1909, this Court.

At the beginning of the litigation the appellee Kessler & Co., Limited, was in possession of the property under a claim of title, and never surrendered that possession until compelled to do so by the final decree of the District Court, which has been reversed.

Jurisdiction not Exclusive.

The fact that one of the parties to this plenary suit happened to be a trustee in bankruptcy, is the real basis for petitioner's assertion that the property is in the custody of the Court. But this fact does not make the suit one *in rem*.

This property has never been seized by judicial process. The trustee was not in possession of it when suit was commenced. The suit is not one to enforce a lien against specific property, to marshal assets, administer trusts, foreclose a mortgage nor a suit of a similar nature. Neither the Court be-

low nor this Court has ever assumed control or possession of the property and never could be required to do so in this suit. This is the fundamental distinction between the case at bar and the authorities cited on petitioner's brief.

The Order of December 14, 1908 (Transcript, p. 1109).

This was an order entered at the foot of the decree of December 4, 1908, above mentioned. It was made and entered at the instance and request of the appellees. It merely restrained the appellant, to whom the erroneous final decree had directed possession be given, from disposing of the property without the consent of the appellees, pending the appeal to the Circuit Court of Appeals from that decree. *In its nature and effect it was a supersedeas order made also partly for the purpose of relieving the appellees from the necessity of giving a very large bond.* The property was then in the possession of the appellant as trustee merely because he had sued for and recovered it, not because the District Court in this suit ever assumed any jurisdiction over the *res*.

The Appellees' Right to the Cripple Creek Stock.

Cripple Creek stock was first put into the appellee, Kessler & Co., Ltd's "Escrow" on October 14, 1904 (Transcript, p. 902). It remained there until September 14, 1906 (*Id.*, pp. 908, 915, 917, 918, 923, 925). It was actually produced for inspection by the agent of the appellee on June 1st, 1905 (*Id.*, pp. 914, 915). On September 23, 1907, and October 21, 1907, the identical certificates in question were substituted for other colla-

teral in the so-called "Special Escrow" to secure acceptances of drafts drawn on the appellee on August 27, 1907, amounting to £20,000 (*Id.*, pp. 934, 935). These identical certificates of Cripple Creek stock in question were issued *in May and August, 1906*, in the name of George Meyer and Albert Katt respectively, employees of the bankrupts, and were endorsed in blank by them and by the bankrupts immediately upon their issue, and were placed in the "Escrow" as security for the advances, as above stated (*Id.*, p. 982).

The Petitioner's Claim to the Cripple Creek Stock.

The petitioner merely asserts that his assignors and a number of other people, whom he seeks to have joined as parties to the intervention, were "for a long time before and on October 25, 1907," the "owners" of this identical stock, and had deposited it with the bankrupts as mere custodians (*Moving Papers*, pp. 3-4). Later on, however, he refers to the so-called "owners" as "paid up participants," thus strongly suggesting a stock syndicate of which the bankers were the managers (*Moving Papers*, pp. 6 and 7). There was, in fact, such a syndicate. *The petitioner does not disclose the nature and terms of this syndicate agreement, nor does he state anywhere the terms and conditions upon which the bankrupts were permitted by these so-called owners to have the custody and possession of stock certificates issued in the names of their own employees and endorsed in blank.* The ordinary syndicate agreement permits the syndicate managers to borrow upon the syndicate stock. The only statement by the petitioner of his alleged cause of action, is the *conclusion*, unsupported by any reference to the essential and

material facts, that the bankrupts had no power or authority to transfer or dispose of this stock (Moving Papers, p. 4). He does not even allege that his assignors were the owners as early as *May, 1906*, when the stock was issued and endorsed as above stated.

The Petitioner's Contract with the Appellant as Trustee in Bankruptcy.

After the Master filed his report on April 30th, 1908 (Transcript, p. 998), the petitioner's assignors applied to the District Court sitting in bankruptcy for confirmation of an agreement with the appellant as trustee in bankruptcy which provided in substance that if the appellant is finally successful in this suit against the appellees, he will turn over to them this small amount of Cripple Creek stock (Moving Papers, p. 7). The appellees were not parties to this agreement.

It appears, therefore, that the petitioner seeks to have this long and expensive litigation reopened for the purpose of trying out a moot question, namely, whether in the contingency that the appellant is finally unsuccessful in this litigation, the appellees should be required to surrender this Cripple Creek stock to him.

The Petitioner's Election to Await the Determination of this Suit.

Upon his own showing, the petitioner and his assignors have deliberately elected not to intervene in this suit. They have made their application to the District Court below for the relief which they desired, as long ago as September 16, 1908 (Moving Papers, p. 7), when they had their agreement with the appellant confirmed.

Since the making of that contract they have patiently stood by and watched the progress of the suit. Now the petitioner has changed his mind. Having deliberately and intentionally waited for two and one-half years, and having made his election he now asks this Court to re-open this long and expensive litigation and to bring in third parties, who may be aliens and non-residents, in order that he may try out his claim against appellees to this small amount of stock.

The petitioner has never been deprived of his right to pursue his remedies against appellees.

On November 8th, 1907, the day the bankruptcy petition was filed, the bankruptcy court made an *ex parte* order appointing the appellant receiver in bankruptcy, which order restrained the transfer of this property by appellees (Transcript, pp. 2, 7). This was before the principal suit had been commenced. This order was not directed to the petitioner and neither restrained the petitioner nor deprived him of any right or remedy he may have had against appellees.

The petitioner has never asked any court to relieve him from any disability which might be predicated upon that order. Never during the entire course of the litigation in the District Court did he attempt to pursue any remedy. He does not specify any remedy which he might have pursued, of which he has been deprived in any manner. These Cripple Creek certificates have, since November 8, 1907, been in the Hanover Safe Deposit Company of the City of New York and are there now (Affidavit of Sprague herewith submitted), and if by any possibility any order of the District Court prevented the petitioner during the

pendency of this litigation in the District Court from bringing a separate action in any court of competent jurisdiction for their recovery, no opposition would have been made by anyone to a motion to modify such order, and it is apparent that such motion would have been readily granted. The purpose of the injunction order above mentioned was obviously to restrain the transfer of the property by the appellees. It was never intended to restrain the petitioner or any other person from enforcing in any suitable manner a claim to the property.

The petitioner asks for a most extraordinary remedy.

He seeks an order of this Court not only allowing him to intervene (Moving Papers, p. 2), but which shall bring in as parties strangers to the record over whom this Court has no jurisdiction. This Court not having taken possession of the *res* cannot adjudicate the rights of persons not parties to the suit.

He further asks for a trial of his claim before some Master or Commissioner to be appointed by this Court. This is not an original suit in this Court. No authority is given by the petitioner allowing this Court to become original triers of fact on an appeal.

The suit being in personam and not in rem, and the Court not having taken possession of the property by any process, there can be no intervention.

The principle just stated is firmly established by the following authorities:

Coleman vs. Martin, 6 Blatchford,
119, 120;

Merritt vs. American, etc., Co., 79 Fed., 228;
1 Foster's Federal Practice, 4th Ed., pages 670, 671, and cases cited;
Fletcher's Equity Pleading & Practice, page 79, Section 55;

Even the fact that parties to a litigation have consented that property or funds may be subject to their control or remain in the custody of a court pending the final outcome of the litigation does not authorize an intervention.

Stillman vs Combe, 197 U. S., 436.

The petition should be denied in any event because of the petitioner's gross laches.

Assuming that this Court, when the cause is on appeal before it, could grant leave to intervene, the petitioner is barred of his right, if any, to such intervention by reason of his gross laches and unreasonable delay in making application. The motion papers (pp. 6 and 7) show that the petitioner and his assignors had full knowledge of this suit from its beginning in November, 1907, and made no move until November, 1909 (Affidavit of Sprague herewith submitted). Nearly a thousand printed pages of testimony were taken before the Master; his voluminous report was filed; printed briefs were submitted and lengthy arguments had in the District Court on the motion to confirm the report; the decision of the District Court was rendered and a decree was entered thereon in favor of the appellant as trustee; an appeal to the Circuit Court of Appeals was allowed and perfected, and a lengthy record was printed and filed; exhaustive briefs were again submitted and the case argued at length

before the Circuit Court of Appeals; a decision unanimously reversing the District Court was rendered, and a decree dismissing the complaint on the merits was entered on the mandate; a further appeal to this Court was allowed and perfected; again the voluminous record was printed and was filed in this Court in July, 1909; and the case had been regularly on the calendar of this Court for almost five months before the petitioner made his first motion for intervention.

The petitioner and his attorney watched the progress of this litigation for two years through the lower courts and never made a motion. Then they filed a petition in the District Court for leave to intervene, which was promptly denied for want of jurisdiction. The petitioner then waited almost four months more and now files his petition in this Court for leave to intervene and to bring in as parties to the intervention other persons not parties to the suit.

This is not a suit originating in this Court, and such delay on the part of the petitioner is unreasonable and constitutes laches, barring the petitioner of his right, if any, to intervene.

Bronson vs. R. R. Co., 2 Black, 524, 528, 532;

2 *Street Federal Equity Practice*, Section 1373, p. 835;

United States vs. Northern Securities Co., 128 Fed., 808, 810, by Thayer, J., seemingly approved in *Harri-man vs. Northern Securities Co.*, 197 U. S., 244, 289;

Central R., etc., Co. vs. Farmers Loan, etc., Co., 112 Fed., 81;

Continental Trust Co. vs. Toledo, etc., Co., 82 Fed. Rep., 642;

11 *Ency. of Pleading & Practice*, p. 504, and cases cited ;
Blatchford vs. Newberry, 100 Ill., 484 ;
Gunderson vs. Ill. Trust, etc., Co., 100 Ill. App., 461, 471, affirmed 199 Ill., 422.

In *Beach Modern Equity*, Section 579, it is stated, "A petition filed at a late stage of the case may properly be dismissed on the mere ground of delay."

Smith vs. Gale, 144 U. S., 509, 520.

In the case last cited, even where a right to intervene was granted by the Dakota Code on filing a complaint with leave of Court, this Court on appeal said (p. 520) :

"By Section 90 of the Code above cited such complaint must be filed by leave of the Court, a limitation on the right to intervene which presupposes a certain amount of discretion in the suit. Such right ought to be claimed within a reasonable time and may properly be refused in a case like the present one where the action has been pending two years and was about to be tried (*Hocker vs. Kelley*, 14 California, 164)."

The same principle should apply in considering a motion for intervention as when leave is asked to file a cross-bill to grant or refuse which is in the discretion of the Court. The courts generally disapprove of the filing of a cross-bill if the original suit has been heard and the merits have been passed on.

Hough vs. Bidwell, 151 Fed. (C. C. A.), 563, 566, citing *Bronson vs. Ry. Co.*, *supra*, *Morgans Co. vs. Texas Central Ry. Co.*, 137 U. S., 171, 201.

Intervention will not be allowed in an appellate court.

There are not many cases where intervention has been sought in an appellate court of last resort but the principle just stated is established by the following:

"A petition to intervene in an equitable proceeding comes too late after the case has been appealed."

11 Encyc. Pl. & Pr., 504, citing
Blatchford vs. Newberry, 100 Ill.,
484, 492.

In the case last cited the Supreme Court of Illinois held, *per curiam*, when the Attorney-General of Illinois sought to intervene in the Appellate Court and asked for a new hearing on the ground that public interests were involved, as follows (pp. 492-493):

"We are of opinion that in a case brought here by appeal, none save such as are parties to the record in this court have a right to be heard. If the interests of the public be such that the Attorney General may properly intervene in this litigation, we think such intervention must begin in the court of original jurisdiction and cannot be allowed here."

See also

1 *Foster*, 4th Ed., page 667, citing
U. S. vs. Northern Securities Co.,
supra;
Bronson vs. Ry. Co., 2 Black, 524,
528, 532.

In the case last cited this Court said as follows (p. 528):

"If the general creditors of a mortgagor

were suffered to intervene in an appellate tribunal, this Court would become the triers of questions of fact outside the record, and that too on *ex parte* affidavits—by no means the best mode of ascertaining the truth.”

The cases cited by the petitioner do not warrant the granting of his motion.

This is clear upon the examination of them, to wit :

Farmers Loan & T. Co. vs. Lake St. Elevated R. Co., 177 U. S., 51 (Petitioner's Brief, p. 5), simply holds that where the Federal Court has first entertained jurisdiction of a bill to foreclose a mortgage, the State Court has no jurisdiction to entertain a similar suit affecting the same property.

Wabash R. Co. vs. Adelbert College, 208 U. S., 609 (p. 6, Petitioner's Brief), simply decided that where a Federal Court had commenced a foreclosure action, the State Court couldn't thereafter sell the property to satisfy certain liens.

Bronson vs. LaCrosse, etc., R. Co., 1 Wall., 405 (p. 7, Petitioner's Brief), simply decides that where the Court is foreclosing a railroad and an appeal is taken from the decree, the lower Court may adopt all proper and judicious measures to protect the property from waste and loss, but beyond this should not deal with the property and all questions of the other use of the revenue should be reserved for such disposition as a final decree on appeal may make.

Krippendorf vs. Hyde, 110 U. S., 76 (cited on p. 9 of Petitioner's Brief), holds that where a United States Marshal has taken possession under writ from the United States Court of certain property which a third person claims to own, the latter

may intervene in the suit while it is pending in the Circuit Court.

The other cases cited by petitioner are not at all in point on intervention in this suit in this Court.

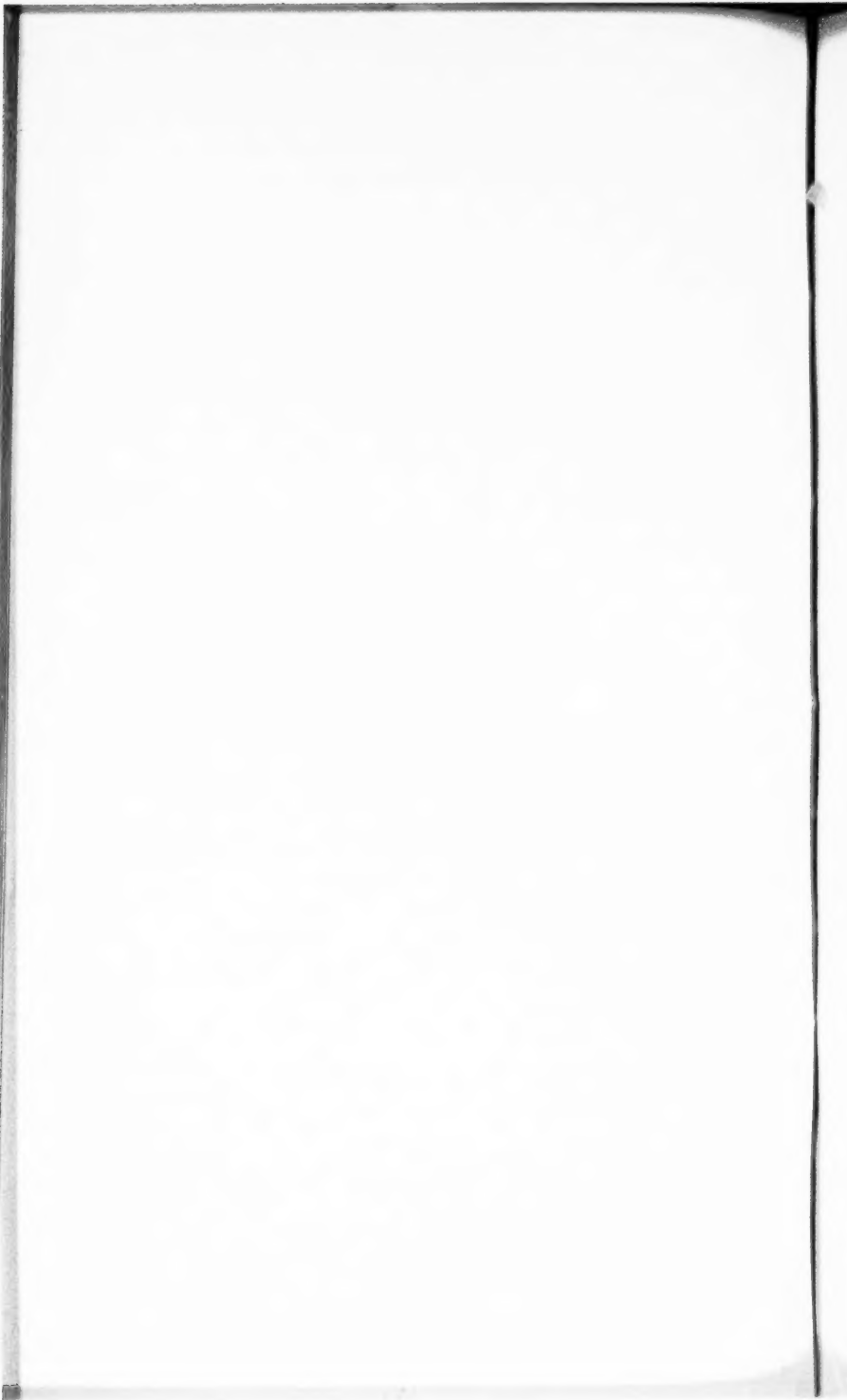
CONCLUSION.

We respectfully submit that the petition for intervention should be denied for the reasons and upon the authorities above set forth.

Dated April 15, 1910.

Respectfully submitted,

ABRAM I. ELKUS,
FREDERICK C. McLAUGHLIN,
RUFUS W. SPRAGUE, Jr.,
Of Counsel for Kessler & Co.,
Limited, and Frank Youatt,
Liquidator, Appellees.



Office Supreme Court U. S.
FILED

APR 18 1910

JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

LAWRENCE E. SEXTON, as Trustee
in Bankruptcy of Alfred Kessler,
Rudolf E. F. Flinsch, and
William K. Gillett, composing
the firm of Kessler & Company,
and of the said Kessler & Company,

Appellant.

No. **1000** 9

vs.

KESSLER & COMPANY, Limited, and
FRANK YOUATT, Liquidator,

Respondents.

BRIEF IN SUPPORT OF JOHN GORLOW'S MOTION TO INTER- VENE, &c.

Petitioner, John Gorlow, claims 766 shares of the capital stock of The Cripple Creek Central Railway Company which is a part of the securities in controversy between the appellant and respondents in this suit. The certificates for this stock are in the custody of an officer of the District Court for the Southern District of New York in this case.

This petitioner applied to the District Court for leave to intervene, but his application was denied on the ground that that Court, by reason of the appeal of this case to this Court, had lost its jurisdiction, &c., &c.

This is a motion for an order allowing the petitioner to intervene here with reference to said stock and, inasmuch as it will be impracticable for this Court to try the issues between the petitioner and the parties to this suit, this Court is asked to direct the District Court, now in physical control of the property, or a Master to be appointed by this Court to hear the claim of this petitioner to said stock, &c., &c.

That this petitioner is entitled to such an order will be evident from a statement of the facts as they appear in the moving papers and in the printed Transcript of Record in this case.

The petitioner claims the stock adversely to the appellant and respondents and his title to the stock cannot be affected in the slightest by the decision which will be rendered by this Court in this case.

Kessler & Company, bankers of New York, were custodians for the petitioner's assignors, and for Taylor, Smith & Evans, George E. Fry and Mrs. E. Von Neufville (all being hereinafter referred to as "the owners" of said 766 shares of Cripple Creek Central Railway Company stock), without any authority to dispose of the same.

Nevertheless, Kessler & Company transferred and delivered said stock with nearly two million dollars of other stock and securities, all of which are the subject of litigation in this suit, to Kessler & Company, Limited, an English corporation (page 1095, Transcript of Record herein). Shortly thereafter, Kessler & Company were put into bankruptcy and Lawrence E. Sexton was appointed Receiver.

Sexton, then Receiver, made claim to all the securities delivered by Kessler & Company to Kessler & Company, Limited, claiming that the

transfer was an unlawful preference under the Bankruptcy Act. Kessler & Company, Limited, filed a petition in said District Court in which the bankruptcy proceeding was pending, demanding that the Receiver's claim be sent to a Special Master to determine the same on the merits (page 2, Transcript of Record herein). Issues between Sexton on one side and Kessler & Company, Limited, and Frank Youatt, who had been appointed liquidator of that Company, on the other side, were framed and submitted to Peter B. Olney, Esq., Referee in Bankruptcy, sitting as Special Master. Evidence was adduced by both sides. A decree awarding all the securities to Sexton, as Trustee in Bankruptcy, to which position he had in the meanwhile been elected, was entered (page 1095, Transcript of Record herein).

The English corporation and its liquidator appealed to the Circuit Court of Appeals, but in lieu of an appeal bond, they, pursuant to an order of the District Court, turned over to Sexton, as Trustee, all the securities, including said Cripple Creek Railway stock, the same to be held by him as an "officer of said District Court" (p. 1109 Transcript of Record herein). By that order, the Trustee "as such officer", was given power to collect dividends, and in fact was given all the powers that are usually granted to a receiver. The decree in favor of the Trustee was reversed. The Trustee appealed to this Court (this cause, No. 530, being the appeal), where this case is now pending.

A supersedeas was granted by Judge Lacombe, staying the execution of the decree of the Circuit Court of Appeals.

Quite a few persons claimed a lien upon or

some interest in this Cripple Creek Railway stock. Finally all such claimants (not including Kessler & Co., Ltd., or Youatt), formally released their alleged claims against the stock to Gorlow's assignors and the other "owners." Thereupon, an order was entered by the Bankruptcy Court that this Cripple Creek stock should be turned over by the Trustee in Bankruptcy to Gorlow's assignors and the other "owners", if it should be received by the trustee, but that this should not affect the right of those parties to bring such suits and proceedings as they saw fit for the recovery of the stock (p. 7, Moving Papers). This order was entered by the Bankruptcy Court after the report of Olney as Master in Chancery in this suit in favor of the trustee in bankruptcy was filed.

Thereafter, all "the owners" except Taylor, Smith & Evans, George Fry and Mrs. Von Neufville assigned to petitioner Gorlow their rights in and claims to said stock.

Gorlow thereupon filed his motion to intervene in the District Court showing that he and said Taylor, Smith & Evans, Mrs. Von Neufville and Fry were entitled to the 766 shares of the Cripple Creek stock.

In denying the petitioner's motion, District Judge Hough (p. 8, Petitioner's Moving Papers herein), took the position that although the District Court may have had power to make a lawful order directed to the custodian, for the preservation of the property, yet an appeal having been taken to this Court, that Court was without jurisdiction to grant the relief prayed for by Gorlow. Judge Hough entered an order denying Gorlow's motion, giving the petitioner, however, "leave to renew in the event only of the ultimate

order of the Supreme Court of the United States conferring upon this Court any further powers that those above enumerated in respect of this cause" (pp. 8, 9, Petitioner's Moving Papers herein).

BRIEF.

This Court having acquired jurisdiction by appeal of the subject matter of the litigation, no other Court, whether State or Federal, now has any power to entertain any suit or proceeding with reference thereto.

Where a Court, State or Federal, has once acquired jurisdiction over a controversy concerning property, and has actual possession of it, or has not taken possession but might be compelled to assume possession or control over it to effectuate its decree, no other Court has the power to entertain any action or proceeding with reference to it.

Farmers' L. & T. Co. vs. Lake St. Elevated R. Co., 177 U. S., 51 (41 L. Ed., 667), 1900.

SHIRAS, J.

(p. 671.) *The possession of the res rests the Court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other Courts of co-ordinate jurisdiction from exercising like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between Courts whose jurisdiction embraces the same subjects and persons.*

"Nor is this rule restricted in its application to cases where property has been actu-

ally seized under judicial process before a second suit is instituted in another Court, but *it often applies as well* where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature *where, in the progress of the litigation the Court may be compelled to assume the possession and control of the property to be affected.* * * * *Peck vs. Jenness*, 7 How., 612; 12 L. Ed., 841, *Freeman vs. Howe*, 24 How., 450; 16 L. Ed., 749; *Moran vs. Sturges*, 154 U. S., 256; 38 L. Ed., 981; 14 Sup. Ct. Rep., 1019; *Central Nat. Bank vs. Stevens*, 169 U. S., 432; 42 L. Ed., 807; 18 Sup. Ct. Rep., 403; *Harkrader vs. Wadley*, 172 U. S., 148; 43 L. Ed., 399; 19 Sup. Ct. Rep., 119."

Buck vs. Colbath, 3 Wall., 334; 18 L. Ed., 257.

MILLER, J.

(p. 360.) "That principle is, that whenever property has been seized by an officer of the Court, by virtue of its process, the property is to be considered as in the custody of the Court, and under its control for the time being; and that no other Court has a right to interfere with that possession *unless it be some Court which may have a direct supervisory control over the Court whose process has first taken possession, or some superior jurisdiction in the premises.*"

See also

Wabash R. Co. vs. Adelbert College, 208 U. S., 609;

Murphy vs. John Hofman Co., 211 U. S., 562; 53 L. Ed., 327.

Neither the District Court nor the Circuit Court of Appeals, after the appeal to this Court, had any jurisdiction to make any order, except for the preservation of the property from waste or loss. This Court is the only tribunal that can make an order allowing the petitioner to intervene or to assert his claim of ownership.

Bronson vs. The La Crosse & Milwaukee R. Co., 1 Wall., 405; 17 L. C. Reps., 616, 617;

Grant vs. Phoenix Mut. Life. Ins Co., 121 U. S., 118.

The petitioner after the appeal to this Court, could obtain no relief in the District Court. If the District Court entertained an intervening petition, it might be compelled to disregard the mandate of this Court which it was bound to execute.

Sibbald vs. The United States, 12 Peters, 488, 489; 9 L. Ed., 1167.

(p. 1169.) "When the Supreme Court have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the Court below to award it. (21 Sec., Judiciary Act, 1 Story's Laws, 61). Whatever was before the Court, and is disposed of, is considered as finally settled. The inferior Court is bound by the decree as the law of the case and must carry it into execution according to the mandate. They

cannot vary it, or examine it, for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded."

In re Potts, 166 U. S., 263; 41 L. Ed., 994,

Gray, J.,

(p. 996.) "The decree entered by the Circuit Court presently after receiving the mandate, setting aside its former decree, and adjudging that the letters patent were valid and had been infringed, referring the case to a master for an account of profits, and awarding a perpetual injunction, was, as it purported to be, in conformity with the mandate of this Court. But the subsequent orders of the Circuit Court, entertaining and granting the petition for a rehearing, without previous leave obtained from this Court for the filing of such a petition, were irregular and unauthorized, based upon a misunderstanding of the mandate, and in practical though, unintentional, disobedience of the command thereof that further proceedings be had in conformity with the opinion of this Court. Upon the record as it stands, a clear case is shown for issuing a writ of mandamus to set aside those orders, and to execute the mandate according to what appears to this Court to be its manifest meaning and effect.

"Upon the question whether an application for leave to file a petition for a rehearing in the Circuit Court could and should be entertained by this Court, at the present stage of the case, no opinion is expressed, because no such application has been made.

"Unless such an application shall be made to this Court within twenty days, and shall upon consideration be granted by this Court, an order will be entered that the writ of mandamus issue as prayed for."

See also

Ex parte Dubuque & Pacific Railroad Co., 1 Wall., 69; 17 L. Ed., 511.

This Court has acquired jurisdiction and is exercising the same. It has the power and it is its duty to protect the rights of third persons in the property which is the subject matter of litigation, and to extend to such persons the fullest opportunity to assert their claims to such property.

This Court in

Krippendorf vs. Hyde, 110 U. S., 276;
28 L. Ed., 145,

realizing the predicament in which third parties might be placed if unable to sue for the recovery of property belonging to them which is the subject matter of litigation between other persons, referring to *Freeman vs. Howe*, 24 How., 450, said:

"For, if we affirm, as that decision does, the exclusive rights of the Circuit Court in such a case to maintain the custody of property, seized and held under its process by its officers and thus to take from owners, wrongfully deprived of possession, the ordinary means of redress by suits for restitution in State Courts, where any one may sue, without regard to citizenship, it is but common justice to furnish them with an equal and adequate remedy in the Court itself which maintains control of the property; and, as this may be not be done by original suits, on account of the nature of the jurisdiction as limited by differences of citizenship, it can only be accomplished by the exercise of the inherent and equitable powers of the

Court in auxiliary and dependent proceedings incidental to the cause in which the property is held, so as to give to the claimant, from whose possession it has been taken, the opportunity to assert and enforce his right. And this jurisdiction is well defined by Mr. Justice Nelson, in the statement quoted, as arising out of the inherent power of every court of justice to control its own process so as to prevent and redress wrong."

The same considerations that moved this Court to lay down and enforce the rule just quoted when applied to the Courts of first instance, have equal weight, we submit, when the cause is in this Court. This Court now has sole jurisdiction; all other Courts are excluded. No Court other than this Court can now afford the petitioner any relief. What was said in *Krippendorf vs. Hyde*, (supra), that "it is but common justice to furnish * * * an equal and adequate remedy in the Court itself which maintains "control of the property", applies to the present situation. We respectfully submit that it is as much the duty of this Court as it was said by this Court to be the duty of the lower Courts "to control its own process so as to prevent and "redress wrongs."

It is no answer to assert that the petitioner should be compelled to wait until this Court has decided the appeal.

That answer could be made to every one who seeks to intervene, claiming property that is in the custody of any Court. Every intervening petitioner could be easily disposed of if the parties to the litigation could shut the doors of the Court in his face telling him that there would then be no obstacle to his bringing suit in an-

other Court, when the Court having jurisdiction over the property, at the termination of the pending litigation released the property, provided he could then get service on the parties or jurisdiction over the property.

This petitioner should not be compelled to wait until this litigation is ended. If he owns the stock he is entitled to its immediate possession and to the use of the dividends.

We call attention to a further consideration: Should the decree appealed from be affirmed, it might be a race between the English corporation and its liquidator, a citizen of Great Britain, and this petitioner as to whether they could get the securities out of the jurisdiction of the American courts before he could get service upon them or impound the securities.

Should the decision of the appeal in this case be favorable to the appellant Sexton, he could not complain of this intervention, for the Bankruptcy Court has ordered him to turn this Cripple Creek stock over to Gorlow's assignors and the other "owners".

When the petitioners's motion was before the District Court, there was some talk of "laches" because neither the petitioner nor his assignors intervened sooner, but it must not be forgotten that the stock claimed by petitioner is only a comparatively small fraction of the securities involved in this suit and there is no claim by any of the parties that they would have abandoned this litigation if they had known of the claim of "the owners"; as a matter of fact, all the parties, all the time, knew of the claim. There is

no pretense that there has been any "change in the condition or relations of the property or the parties" by reason of any delay on the part of the petitioner.

Galliker vs. Cadwell, 145 U. S., 358; 36
L. C. Reps., 738.

It is respectfully submitted that petitioner's motion should be granted.

HENRY WOLLMAN,
KURNAL R. BABBITT,
Counsel for John Gorlow,
Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 92.

Office Supreme Court, U. S.
FILED.

DEC 7 1911

JAMES H. McKENNEY,

CLERK.

LAWRENCE E. SEXTON, AS TRUSTEE IN BANKRUPTCY OF
KESSLER & Co.,

Appellant,

against

KESSLER & COMPANY, LIMITED, AND ITS LIQUIDATOR,

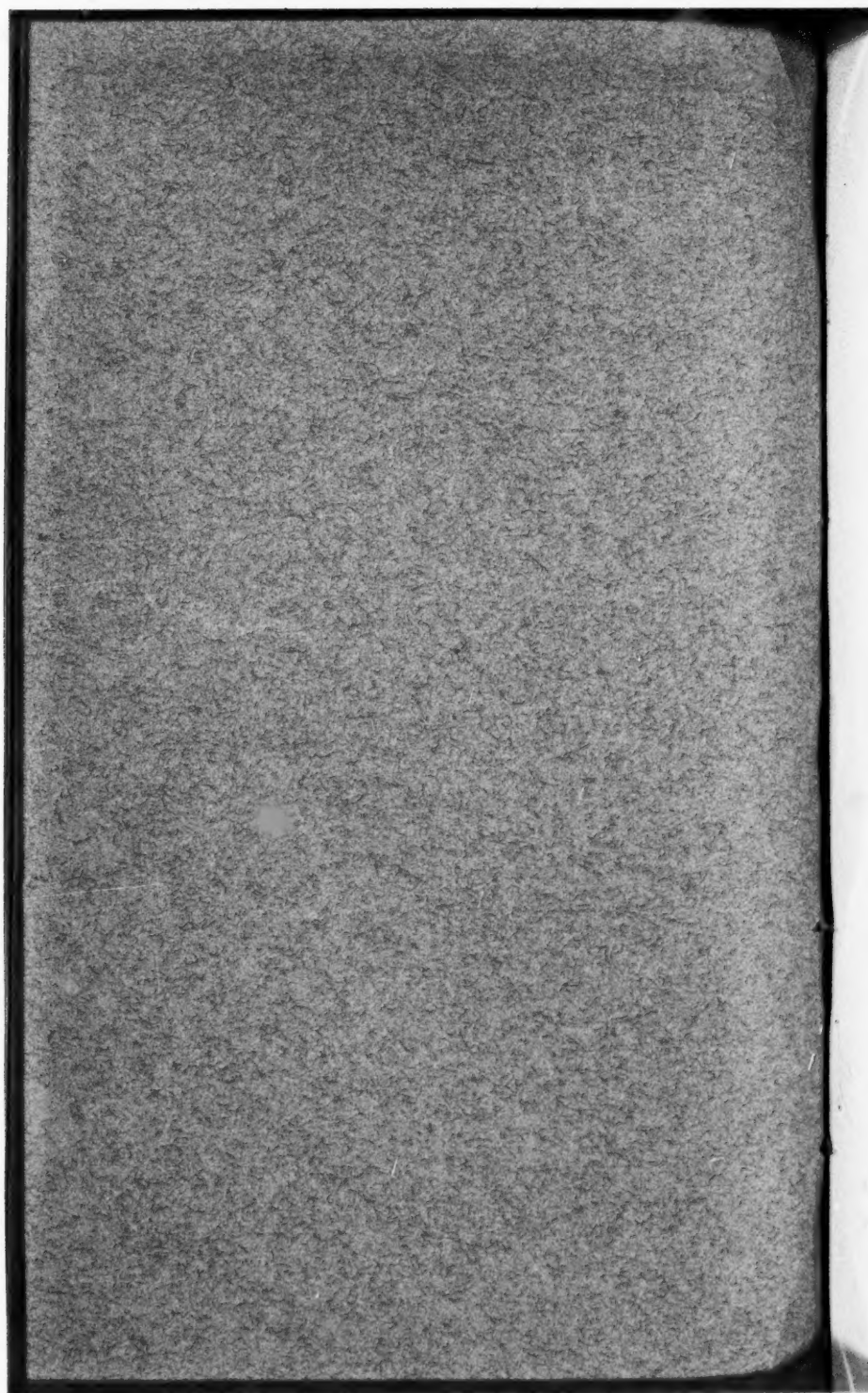
Appellees.

Brief for Appellant.

JOHN LARKIN,

Attorney for Appellant,

44 Wall St., New York City.



Supreme Court of the United States.

LAWRENCE E. SEXTON as Trustee in Bankruptcy of Kessler & Company and ALFRED KESSLER, RUDOLPHE E. FLINSCH and WILLIAM K. GILLET, composing the said firm of Kessler & Company,
Appellant,

AGAINST

KESSLER & COMPANY, LIMITED,
and FRANK YOUATT, liquidator,

Appellees.

October Term,
1911.

No. 92.

BRIEF FOR TRUSTEE IN BANKRUPTCY PLAINTIFF-APPELLANT.

This is an appeal by the plaintiff-appellant from a decree of the United States Circuit Court of Appeals for the Second Circuit, entered June 9, 1909, reversing a final decree of the United States District Court for the Southern District of New York, entered December 4, 1908, in favor of the plaintiff-appellant and directing a dismissal of the bill as to the defendants-appellees. This appeal is taken under the Act of March 3, 1891, 26 Stat. at Large, 828, Section 6 as amended.

The matter in dispute exceeds the sum of \$1,000, exclusive of interest and costs (Record, p. 1146, top).

Statement of the Case.

On October 25, 1907, the defendant Kessler & Co., of New York, transferred certain securities (itemized pp. 936 and 937 of Record) valued by them at \$631,859, to Kessler & Company, Limited, of Manchester, England, one of the former's creditors. On the 30th October, 1907, Kessler & Co., of New York, made an assignment for the benefit of creditors and on the 8th day of November, 1907, a petition in bankruptcy was filed against them and a receiver therein was appointed.

The order appointing the Receiver also contained an injunction running against Kessler & Co., of Manchester, and Henry Kessler, the managing director of said company and chairman of the Board of Directors, restraining them from removing said property from the City or State of New York or from the possession of the Hanover Safe Deposit Company where the securities were then lodged (Record, p. 7, bottom).

The securities were thus reached by the process of the Bankruptcy Court. Thereafter the Manchester house of Kessler & Co. took proceedings for voluntary liquidation and the defendant Youatt was appointed liquidator therein on or about November 18, 1907. Subsequently Kessler & Co., Limited, of Manchester, and the liquidator filed in the Bankruptcy Court a petition waiving its right to a plenary suit (Record, p. 9, top) and praying for an order referring the claim of the bankrupt estate to said securities for hearing upon the merits to a special master, and directing the Receiver to proceed with said claim so far as practicable from day to day.

This petition was granted and an order entered as prayed for (Record, pp. 10-11) referring said claim

to Peter B. Olney, Esq., as special master to hear and determine the same upon the merits.

The claim made by the Receiver in Bankruptcy is set forth in his petition (Record, p. 12) and asserts that the transfer of the securities made by Kessler & Co. of New York to Kessler & Co. of Manchester was made when the former was insolvent and within four months prior to filing said petition in bankruptcy and the result of said transfer was to enable Kessler & Co. of Manchester, a creditor, to obtain a greater percentage of its debt than other creditors of the same class; and that Kessler & Co. of Manchester or its agents acting therein in receiving said transfer of securities had reasonable cause to believe that it was intended to give a preference thereby.

The answer of the defendants was a concession of jurisdiction, a waiver of plenary suit and a general denial as to the merits.

On December 30, 1907, Lawrence E. Sexton, the Receiver in Bankruptcy, was duly elected trustee in bankruptcy, and thereafter duly qualified.

Thereafter upon his petition and upon the consent of the attorneys for the defendant an order was made and entered February 7th, 1908, substituting the said Sexton, as Trustee in Bankruptcy, as plaintiff in the action in place and stead of the Receiver in Bankruptcy.

Thereafter and on March 23rd, 1908, an order on consent was entered (Record, pp. 40-42) which directed that the proceeding be considered a plenary suit in equity, designated Mr. Olney as Master in Chancery, and amended all papers accordingly—all without prejudice to the proceedings already had.

The Master in Chancery found the facts and law in favor of the plaintiff's contention. The Master's findings of fact and conclusions of law were confirmed by the District Court; but on appeal to the Circuit Court of Appeals the decree in favor of the plaintiff was reversed upon the law.

The facts were not disturbed.

Assignment of Errors.

(Record, p. 1146.)

1st. The Court erred in reversing said decree of the District Court of the United States.

2nd. The said Court erred in awarding costs against the said Lawrence E. Sexton upon reversing said decree.

3rd. The said Court erred in remanding the cause to the District Court of the United States with instructions to dismiss the bill of complaint, with costs

4th. The said Court erred in holding that the transactions between said bankrupts and the defendant Kessler & Company, Limited, as found by the Master in Chancery and the District Court of the United States constituted a declaration of trust by the bankrupts in favor of the defendants Kessler & Company, Limited, in respect to the securities which are the subject of this action or any securities for which said securities were substituted.

5th. The Court erred in holding that any trust of the said securities, or securities for which the said securities were substituted, existed in favor of the defendant Kessler & Company, Limited.

6th. The Court erred in holding that the facts as found by the Master in Chancery and by the District Court of the United States constituted a mortgage of the said securities from the bankrupts Kessler & Company to the defendant Kessler & Company, Limited.

7th. The Court erred in holding that the facts as found by the Master in Chancery and by the Dis-

trict Court of the United States constituted a pledge of the said securities from the bankrupts Kessler & Company to the defendant Kessler & Company, Limited.

8th. The Court erred in holding that the facts as found by the Master in Chancery and by the District Court of the United States constituted an equitable lien in the nature of a mortgage upon the said securities in favor of the defendant Kessler & Company, Limited, which equitable lien was valid against the complainant with or without a change of possession.

9th. That the Court erred in holding that when the defendant Kessler & Company, Limited, obtained possession of the said securities on October 25th, 1907, it lawfully held them as pledgee or mortgagee.

10th. That the Court erred in holding that the transfer of possession of the said securities on October 25th, 1907, to the defendant Kessler & Company, Limited, was not a transfer made within four months of bankruptcy within the meaning of the act of Congress known as the Bankruptcy Act.

11th. That the Court erred in holding that the facts herein as found by the Master in Chancery and by the District Court of the United States did not constitute a voidable preference within the meaning of the act of Congress known as Bankruptcy Act.

12th. That the Court erred in holding that the transfer of the said securities from the bankrupts Kessler & Company to the defendants Kessler & Co., Limited, did not take place within four months of the filing of the petition in bankruptcy.

13th. That the Court erred in holding that the taking possession of said securities by the defendant

Kessler & Company, Limited, on October 25th 1907 related back to June 30th 1903 the time of the arrangement between the bankrupts and the said defendant Kessler & Company, Limited, or to any other date.

14th. That the Court erred in holding that the defendant Kessler & Company, Limited, had an equitable right to the said securities and that said right and equity were created years before the bankruptcy and that said defendant could at any time have enforced its said right to the possession of said securities, and that no element of fraud or any intervening rights of purchasers or attaching creditors here appear, and that said securities were not property, the possession of which would be visible to third persons or would afford a basis of credit, and in holding that such possession was taken by the said defendant on October 25th, 1907, in pursuance of a pre-existing right and that no estoppel obtains against the said defendant.

15th. The Court erred in holding that the facts herein as found by the Master in Chancery and the District Court of the United States as a matter of law did not and could not constitute reasonable cause in the defendant Kessler & Company, Limited, to believe that the bankrupts in surrendering possession of said securities on October 25th, 1908, intended to give the defendant Kessler & Company, Limited, a preference, and that said defendant as a matter of law took said possession as a matter of right under a mortgage or pledge.

The errors assigned are intended to bring before this Court for determination the following propositions:

- a. May the privileges of a pledgee be raised against the pledgor's trustee in bankruptcy when the pledgor was allowed to remain in

possession of the property and deal with it as his own with no delivery to—or possession by—the pledgee until within four months of the pledgor's bankruptcy.

- b. If such a transaction fails as a pledge may it be sustained as against such trustee as an equitable mortgage, an equitable pledge or a declaration of trust as against such trustee.
- c. Was not the arrangement fraudulent as a matter of law and void in any aspect of the case as against the trustee?

Statement of Facts.

At all the times that concerns this suit, and for many years prior thereto, the appellee, Kessler & Co., Ltd., a corporation, or its predecessor, the English firm of Kessler & Co., were engaged in the business of accepting drafts, issuing and honoring letters of credit, accepting deposits, &c.; they were also engaged in a general dry goods business. The principal office was at Manchester, England; but there were branch offices at Bradford, England, and also at New York City.

At all such times there was also a New York firm or copartnership called Kessler & Co., whose business was buying and selling exchange, making and obtaining loans, buying and selling securities on and off the New York Stock Exchange, advancing moneys in a commercial way, financing various kinds of enterprises, issuing letters of credit, accepting deposits, and generally carrying on the business of domestic and foreign banking. Of the two concerns, the English one was the more important.

Prior to 1901 William Kessler, of England, the father of the bankrupt Alfred Kessler, was the head of the New York firm and also of the English firm. He died in 1901, and the New York firm then took in the bankrupt Gillett as a member; but

the estate of William Kessler still remained interested in the New York firm, because not only was his original contribution of \$95,000 allowed to remain either as capital or as a loan (p. 56), but the estate also loaned to the bankrupt Alfred Kessler \$78,000 to be used as further capital.

In 1902 the English firm was changed into a corporation, which is the appellee here; and the estate of William Kessler took shares therein for his interest in the English firm (Master's Report, pp. 1003, 1004). The authorized capital stock was £250,000, divided equally between ordinary and preferred shares. Of the £125,000 of ordinary shares the executors of William Kessler owned £80,000, Henry Kessler (uncle of the bankrupt Kessler) about £5,000, P. W. Kessler (brother of the bankrupt Kessler) £10,000, *Alfred Kessler, one of the bankrupts*, £3,000, and, except Mr. Averdieck and Mr. Mazzabach, who owned £10,000 and one share respectively, *none except members of the Kessler family had any interest in the ordinary shares.*

Of the £125,000 preferred shares authorized, only £112,000 were issued; and of the latter Hugo Kessler owned £7,000; Mrs. Manskopf, £2,400; her daughter Marion, £1,200; Helen Linthe, a niece, £2,000; Mrs. Edward Kessler, £10,000; George Kessler's trustees, £,5000; William Kessler's widow, £6,500; George A. Kessler, £3,000; P. W. Kessler, £10,000; *Alfred Kessler, one of the bankrupts*, £3,000; his sister, Mrs. Ashton, £1,500, and another sister, Mrs. Solly, £1,500.

The Kessler family, therefore, owned £108,500 out of £118,500 ordinary shares, and £54,300 out of £112,500 preferred shares (Master's Report, pp. 1003-1004).

The directors of the appellee were Henry Kessler, P. W. Kessler, George Kessler and George Averdieck (Master's Report, p. 1003); and all its members resided and still reside in England, except the bankrupt Alfred Kessler.

BUSINESS DEALINGS BETWEEN THE TWO HOUSES.

These two houses, thus closely connected by common members, by common financial investment, and by the closest family blood relationship, had carried on business for many years, and a large part of it had consisted in the New York house selling here bills of exchange drawn by the latter on the appellee, *which the appellee accepted for a commission* (pp. 480, 481). The drafts were generally "long" drafts, or long term drafts, so called because they matured along time, sixty or ninety days, after acceptance. But so close were the ties between the houses, and so complete the confidence reposed in the New York house that, so far as appears, no security was ever asked of or given by them for final payment of their drafts.

In 1903 certain correspondence passed between the two houses looking to a so-called "security" or "protection" to the English house in its acceptance of these drafts. The correspondence consisted of a letter from the appellee on February 17, 1903 (Record, p. 980); and of a letter from the bankrupts on June 30, 1903 (Record, p. 889) and one from the Manchester house on July 8, 1903 (Record, p. 889). These letters indicated the plan of "security" or "protection" to be followed; and that plan is relied on here by the appellee to avoid the provisions of the Bankruptcy Act. It will be noted that the first letter is marked "*Private*"; it begged to refer to the question of New York's providing "security" for drawings which had already been touched on "privately"; that as it would not be convenient for New York to provide this immediately, "and as we in no wise wish to inconvenience you," June 30th was fixed as the date when "the necessary securities should be set aside for us and a list sent us"; that the writers did "not propose to name a fixed amount of credit," but would rather like to see the present drawings reduced somewhat (Record, p. 980).

Following up this, the New York house wrote on June 30, 1903, stating that as instructed by the bankrupt, Alfred Kessler, they had that day "placed in a separate package in our safety vault the following securities marked 'escrow for account of Kessler & Company, Limited, Manchester,'" which "escrow is intended as a protection against our long drawings against your good selves"; a list is given of Oklahoma shares, United Lighting & Heating shares, Daimler Mfg. Co. shares, and United Breweries bonds, total stated value \$426,081 (Record, p. 889).

Receipt was acknowledged by the appellee on July 8, 1903, which stated that *"if at any time you have the opportunity of realizing these securities or any part of them you are at liberty to take them and replace them by others of equal value, though in that case we should of course like to see rather better quality."*

The exact words of the three letters referred to, were as follows:

"17 FEB. 3.

Private.

Messrs. KESSLER & Co.,
New York.

DEAR SIRs:

We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to provide this immediately, and as we in no way wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30th of June of this year, by which date the necessary securities should be set aside for us and a list sent to us. We do not propose to name a fixed amount of credit; suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced.

We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for and we remain, dear Sirs,

Y'rs very truly,
P. W. KESSLER."

" JUNE 30, 1903.

Per S. S. 'OCEANIC.'
Messrs. KESSLER & Co., Limited,
Manchester.

DEAR SIRs:

In accordance with instructions from Mr. Alfred Kessler we have today placed in a separate package in our safe deposit vaults the following securities, package marked, 'Escrow for account of Kessler & Co., Limited, Manchester:'

1484 shares Oklahoma Gas & Electric Co., at 25.....	\$37,100.
2428 shares United Lighting & Heating Co., at 12.....	29,136.
2352 shares Daimler Manufacturing Company, at 50.....	117,600.
\$373,000. United Breweries Co. first 6s, at 65	242,245.

\$426,081.

This escrow is intended as a protection against our long drawings against your good selves.

Kindly confirm if in order, and oblige,

Yours very truly,

KESSLER & Co."

" 8th July 3.

Messrs. KESSLER & Co.
New York.

DEAR SIRs,

We are in receipt of your favor of 30th ultimo, in which you advise us of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up to us and the matter goes in order.

If at any time you have the opportunity of realizing these securities or any part of them,

you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality. * * *

We are, dear Sirs,
Your very truly,
P. W. KESSLER."

This authority to sell was repeated in the letter of January 20, 1904 (p. 892).

CONTINUED BUSINESS BETWEEN THE HOUSES.

The plan thus outlined was followed by the two houses. Between 1903 and 1907 New York continued to sell drafts on Manchester, *which Manchester accepted for a commission* (pp. 480, 481).

The securities which the bankrupts held as "protection" for the appellee were kept in this wise: the bankrupts had a special safe or vault, where property and securities belonging to third persons were kept; the securities in question were not kept there. They also had a general safe or vault, where such of their securities were kept as were in general use; that safe or vault consisted of three compartments, in the lowest of which was kept the leather trunk holding the securities that were carried back and forth to the office every day. The upper two compartments were formed by shelves, on which were placed other securities. The securities in question were on one of these shelves, and were kept either in an envelope marked as indicated in the letter of February 17th, 1903, or, if the envelope would not hold them all, in a rubber band binding them to such an envelope. The bankrupts kept a "loan book," in which was recorded in *black* ink the loans *by* them and the securities held therefor, and in *red* ink the loans *to* them and the securities given by them therefor; among the red ink entries were the list of securities then present in the "escrow."

Of the securities in the escrow, the bankrupts collected the coupons and interest when due; from

time to time they removed batches of the securities, and sold them or hypothecated them, and placed the proceeds in their own bank account; but never remitted such proceeds to the appellant or in any wise accounted to the appellant for them (p. 1038). Of such removals Manchester was notified afterwards by a private letter, and Manchester invariably replied, by private letter, that the act was "in order." Frequently, when the bankrupts removed and disposed of such securities they substituted therefor such other securities as their discretion or convenience dictated, and in that case changes in the loan book were made accordingly; they notified Manchester of such changes, and Manchester never objected to a change, or claimed or exercised any right to supervise or veto the substitutions; at times they were mildly quizzical as to the quality of the substitutions, but nothing more.

But frequently the bankrupts (although keeping the proceeds of a sale or hypothecation of these escrow securities, and not accounting to Manchester therefor) never made any substitution therefor at all; and this was invariably the case when they could spell out any increase in the escrow's market value, so as to produce a supposed surplus over the outstanding drafts. And in every such case Manchester advised that the bankrupts' act was "in order." The record contains a list of notifications and approvals of these withdrawals (Record, pp. 879-885, 889-937).

BUSINESS AND CONDITIONS IN 1907.

The business dealings between the houses continued as before down to 1907. In that year the difficulties of the New York house, which has begun some time before, increased. The bulk of their securities were not listed on the New York Stock Exchange; a large part of them had been taken over as a result of unsuccessful underwritings, and the bankrupts had held on to them for one, two or three years in order to sell them without a loss, con-

tinually hoping the market would change for the better (Master's Report, p. 1030). In 1907 the securities were unsalable and useless as collateral, so that the firm's maturing obligations could not be taken care of in that way; and even first-class Stock Exchange securities had declined substantially since the beginning of the year; many of their foreign correspondents had withdrawn or shortened the bankrupt's drawing credits, the German Bank of London had cut off entirely their £10,000 drawing credit (p. 506); Schunck & Co. did the same for a like amount and refused to renew it (pp. 508, 697); the Anglo-Foreign Banking Company refused to renew advances on Cripple Creek securities pledged (p. 696), and the London banks exhibited great unwillingness to extend credit to American houses, and a further contraction was expected (p. 704). There were other difficulties: failures had taken place in the financial world (p. 752), and the bankrupt's business had been bad (p. 750); the balance sheet showed a loss of \$35,000 for April (pp. 752, 753); it was getting harder to sell exchange, the bankrupts had become borrowers and their loans were falling due, one for \$100,000 was called, a creditor had sued them and after trial the jury had rendered a verdict against them for \$140,000 (p. 1030); their long term drafts on various bankers in London, Paris and various cities on the Continent had to be met, and the situation was grave, not to say desperate. Thereupon on June 15, 1907, the bankrupt Flinsch sailed for Europe to see if he couldn't get some help over there. He arrived in London on June 25th, and his correspondence thereafter with the New York house and between P. W. Kessler and the bankrupts give a picture of the financial straits of this house for the six months prior to the bankruptcy petition. His letters refer to his efforts in London, all of which failed; then to those in Frankfort and Dresden, all unsuccessful (pp. 701, 702); then he almost got help in Switzerland, but the banks there

required security, and he was afraid to give it for fear all the other banks might also demand it; he tried to get help from his own family, succeeded in collecting some amounts due from some of them, but was afraid to dun them too hard for fear they and their financial circle would conclude his firm was in difficulties.

During his absence abroad Flinsch was in constant correspondence not only with Alfred Kessler of his own firm, but with P. W. Kessler of the appellee (pp. 710, 712, 714, 134); and finally a meeting was arranged between Flinsch and P. W. Kessler at Baden Baden on September 17th. *After a subsequent meeting at Frankfort (p. 844) Kessler immediately left for England, and a couple of days after P. W. Kessler's arrival, Henry Kessler, of the appellee, started for New York post haste.*

In the meantime letters of the fullest confidence had passed between New York and Manchester; as soon as prepared the bankrupt's balance sheets were forwarded to the appellee; criticisms by Manchester of the bankrupts' methods were respectfully listened to, and apologies or explanations made; business generally was reported, especially regarding Cripple Creek stock and U. S. Reduction & Refining stock (both of which were at various times in the escrow) the loss of the Daimler plant by fire (Daimler stock also in the escrow), the collection of insurance thereon (pp. 744, 746, 753); the worrying times; the fall in Stock Exchange prices, often twenty-five points an hour; the unsalability of exchange, their method of borrowing; the Sidenberg verdict against them for \$140,000; the nervous condition of the Exchange, and the failure of a prominent banking house; the bankrupt's bad business during the past year; their net loss of \$35,000 in April (pp. 749, 750, 753, 754); that a partner, the bankrupt Gillett, is drawing too much out of the firm; that the cause of the heavy drafts on Manchester is because the Dresden Bank had stopped their long drawings; that the Basler Handelsbank had required A1 collat-

eral; that the German Bank had refused to continue its £10,000 credit, and that Ruffer had knocked £10,000 off theirs; that Flinsch had been after his family for money (pp. 756, 761, 762, 764); failure to sell exchange against Cripple Creek stock, and "we were forced to sell £20,000 Manchester and put up escrow as per separate letter" (p. 767); expresses regret for Manchester's worry, and that he, the bankrupt Kessler, *had had to take doses to obtain sleep*, and the worries of 1893 and 1903 were nothing to those of last month; that Dreyfus had refused to renew credits; that Daimler will be a loss; of a disaster on the P. W. & S. Ry. (one of the escrow stocks) that will spoil the showing of earnings; that Milne, Trumbull & Co. (one of the concerns they were financing, whose paper was in the escrow) was not good and had run behind \$7,000; that some of the companies whose stocks and bonds were in the escrow "are our *betes noir*, and the truth is that our condition is not as good as it was at the end of last year" (p. 767), &c., &c.

This letter was answered by P. W. Kessler, and has been offered in evidence by the defendant (p. 843).

It is the only letter of Manchester which we have been able to obtain relating to the correspondence passing between the parties on the subject of the financial condition of the New York house.

This letter was written after the meeting with Flinsch in Frankfort, and from it it appears that he had written Flinsch a long letter, and that a copy of that letter was enclosed.

Neither letter nor copy has been produced.

The attention of the Court is particularly called to this letter, of which the following is an extract (Record, p. 843):

"I safely received your letter of the 6th.
 "It was much what I expected and not altogether pleasant reading. I sent it on to
 "Eddy for his comments. I am very sorry
 "for you, but with that enormous line of

"drawings on us, I am afraid I cannot leave
 "all the worry to you.

"If these drafts should want caring for,
 "we should find ourselves in a *very bad hole*
 "and I must say I am not easy."

FAILURE OF NEW YORK HOUSE AND SEIZURE BY AP- PELLEE OF THE SECURITIES.

Henry Kessler, the chairman of the appellee's Board of Directors, and the uncle of the bankrupt Alfred Kessler, left Manchester on September 26 and arrived in New York on October 4, 1903. He made the bankrupt's office his headquarters and received mail there for the first part of his stay; afterwards his mail came to Kissel, Kinnicutt & Company, bankers, in Wall Street. On 7 October, 1907, the Manchester house sent the following cable to him (Master's Report, p. 1043):

"Flinsch here 12 A. M. their position not at
 "all satisfactory please consult A. K. would
 "advise selling stock are trying here arrange
 "loan against Orleans Cripple success doubt-
 "ful.
 "Do not approve of more Manchester.
 "What is best that can be done."

A further cable came from Manchester about October 18, 1907, to Henri Kessler (pp 781 and 784, Record; Master's Report, 1043).

On October 20th, the directors of the Knickerbocker Trust Company met and asked assistance of the Clearing House, which was refused; on October 22nd that trust company failed, and immediately a run started on the Trust Company of America, almost opposite the bankrupt's house, and the lines of withdrawing depositors stretched for blocks, remaining night and day in their places, and mounted police had to keep order. During the week of October 21st, the bankrupts made frantic efforts to borrow money, but without success. On October 24th there was no money to be had on the Stock Exchange until 2 P. M., when

\$25,000,000 was placed on the floor to loan at 50 (fifty) per cent., and the closing of the Exchange was contemplated. On that day Henry Kessler consulted with Mr. McLaughlin, the appellee's attorney, with reference to the appellee's position and the escrow securities, told Mr. McLaughlin that the securities were not in the possession of the Manchester house, but were set aside and "pledged to us"; Mr. McLaughlin stated that he did not consider that safe, and advised Henry Kessler, as a director of appellee, to get the securities into his possession (p. 396). Henry Kessler saw Kissel ("Gus") on October 24th and conferred with him. On October 25th there was little, if any, money on the Stock Exchange, and what there was was quoted at 115 per cent (p. 97). On that day he went to the bankrupts' office, saw Bertie Kessler, a kinsman and confidential clerk of the bankrupts, told Bertie Kessler that he was going to take the securities, and together they went to the vault, got the escrow securities and put them in another vault in the same safe deposit company which Henry Kessler engaged in the name of appellee (p. 399). At that time the Elkton stocks, although listed as being in escrow, were actually out west in the possession of the bankrupts' agents (United Lighting and Heating Stock, although listed too, were elsewhere, but they are not the subject of this litigation). On the same day Henry Kessler sent this cable to the appellee:

"Have secured escrow, financial affairs
 "critical, cannot sell demand. Is it possible
 "arrange with Lloyd's Bank limited cash
 "loan against Cripple" (p. 431)

and wrote to P. W. Kessler the following letter:

"KESSLER & Co.,
 Bankers.
 54 WALL STREET,

NEW YORK, 25 October, 1907.

DEAR WILLY:

I wrote you on the 22d inst. and received your 2 letters of 15th & 16th inst., *we have*

had two very miserable & exciting days here, you will have seen all from the papers how Morgan & others helped the stock Exchange with funds. Alfred just comes with the news that they will issue Clearing-house certificates, this they hope will relieve the money market. The great difficulty is to sell Exchange even cheques and this has bothered McLean very much, however he succeeded in getting what he wanted for to-day; but the position is very awkward and we must hope that next week the Exchange market will be better as otherwise K. & Co. like many others would be in a hole. I saw Cass yesterday I asked him to buy some of our bills, but he said he did not know what to do with them.

At the suggestion of Alfred I cabled you to-day if you could not arrange from Lloyds a cash advance against Cripple Creek; however I doubt it. Alfred sold a few stocks, but it is very difficult to get rid of anything & things outside the Stock Exchange are unsalable & that is the reason why stocks have gone down so much. The Central Trust Co. called to-day for their loan of \$100,000; but Alfred could arrange with Wallace to let it lie over until next week. He is naturally very much worried, but I am trying to calm him down. He cabled Flinsch to-day he wanted \$200,000 by Monday & asked him what he could do to find funds. You have no idea how things are here, the Trust Co. of America was besieged the last two days by depositors wanting their money. Police on horseback & foot kept order in Wall Street. Of course we cannot say where all this will lead to, but things seem a trifle better to-night, Saturday & Sunday may help to calm the excitement.

It is strange I anticipated all your ideas about our Escrow as you will see from my memo of yesterday. Your & Eddy's letters strengthened my hands & we acted on it at once. I went with Bertie to the North American Safe Deposit Co. Exchange Place secured a small safe in the name of K. & Co. Lt. Manchester, England, and gave power to Bertie, McLean & Nestle, Bacon would

not have done. To open this safe, the combination No. of the Lock is 197 & Box No. 2097. We went carefully through all the documents to see that they are all endorsed & in order, the Brooklyn Mortgage has a transfer in blank by Gillett & his wife, the other notes are all endorsed in blank. I think we *are safe now*, anyhow we are in possession of the documents. Alfred has made out a new list at *reduced* prices, amounting to about \$513,000—against the £80000.—credit. The other £20,000.—are in the separate escrow also in our safe. *To get anybody to take care of our bills here* in case of need would be very difficult, probably impossible. *Brooks would have to help us thro' against the securities we could give him. If K. & Co. can pull thro' which I hope*, we must get out of this acceptance business or reduce it considerably. Alfred telephoned for Gillett to come down he promised to come in the afternoon, but did not. It is most harassing & annoying that the man is no good & cannot be tackled. I hope Flinsch will be here soon

Alfred would like you to see if you cannot get a quotation in London about the Underground Electric London in our escrow. Saw Hesslein & Ernst yesterday, the latter is coming over next week; I was astonished what a large place theirs is, about 100 clerks & 2 large warehouses.

Called again on Abbs & asked him to push where he could for remittances. * * * The rest of the day I spent at Wall Street & must say I have by now had more than enough of it. I hope I can get off by the "Baltic" next week, but will first see how things are going here before I decide. * * * Bertie & Nestle dined with me yesterday & they went to take me a Motor ride tomorrow. Sunday I am going out to Guss at Morristown.

Weather keeps very fine & cool. I hope this will be my last letter & au revoir, love from Alfred

Your affect. cousin,

HENRY.

I added to my cable "Yes" in answer to Zimmermas inquiry about the Collmann din-

ner, but I would rather be out of it, however I suppose I had to accept."

The cable to Flinsch, referred to in this letter, reads as follows:

"Financial affairs critical, cannot sell demand, Central Trust has made a call loan
 "one hundred thousand dollars, we require
 "one million marks October 28th, can you
 "obtain?" (p. 433).

On October 29th, Henry Kessler was at the bankrupts' office until four or five o'clock in the afternoon and had an interview with Mr. Kissel, and Alfred Kessler and Mr. Kissel also had a long private interview. On that day the subject of a general assignment by the bankrupts was considered, and the draft of such a document was in fact already prepared (p. 93).

During the week ending October 26th and that commencing October 28th, the bankrupts, in addition to their ordinary business obligations and their current obligations as depositaries of funds subject to check, had to furnish "cover" for drafts on London to upwards of a million dollars (p. 657). Alfred Kessler sought assistance from J. P. Morgan (p. 466). *On October 30th the general assignment was made which recited the inability of the firm to pay its debts in full* (pp. 562-567). Thereupon Henry Kessler cabled the appellee:

"Assigned, Kisskin (meaning Kissel, Kin-
 "nicutt & Company) advise ask Lloyd's
 "Bank Limited Manchester advance against
 "collaterals escrow, cannot obtain advance
 "here now, stop order shipment Bentley's
 "goods, eight hundred pounds with Gressley
 "all paid."

And Bertie Kessler cabled Manchester, "Assigned, Manchester may be safe. Bertie." After the assignment the bankrupts obtained by mail the Elkton shares from their agents out west and turned

them over to Henry Kessler (p. 314), and also just before the main escrow was delivered to Henry Kessler, Daimler common was taken out of the escrow and Daimler preferred substituted, the latter being deemed more valuable.

On November 7th, 1907, the creditors filed an involuntary petition against the bankrupts, and they were on that day adjudged bankrupts.

FINDINGS OF THE COURTS BELOW.

The Master found, on an overwhelming preponderance of evidence, that the bankrupts were insolvent on October 25, 1907, and that on that day, which was within the four months period, they made a transfer to the appellee, the effect of which transfer was to enable the appellee to obtain a greater percentage of its debt than other creditors of the same class; and that the appellee then had reasonable cause to believe that a preference was thereby intended (pp. 1039, 1040, 1046).

The District Court confirmed the Master in toto (pp. 1089-1104).

The Circuit Court of Appeals, without disturbing or criticising the facts found, reversed on the law, *and dismissed the bill.*

POINT I.

There was no valid legal pledge to the defendants because possession was not given until October 25, 1907.

Kessler & Company, of Manchester, had an office in New York; nevertheless they allowed the secur-

ities to remain with the bankrupts; and the bankrupts, although they had a special vault for securities belonging to third persons, did not keep these securities there but in their own vault (Record, p. 126, p. 838). The securities kept by the bankrupts in their vault had been examined on two different occasions, once by P. W. Kessler and once by Mr. Youatt, now the liquidator.

During the time that the securities remained with the bankrupts changes were made therein all the time (pp. 215-317). After the changes were made Kessler & Company, of Manchester, were notified thereof by mail and not by cable (Master's Rep., p. 1009).

Letters from the bankrupts were kept in a *private* letter book and letters from Manchester were filed in a *private* letter file (pp. 140-265). The correspondence relating to the escrow was known only to three people in the office (pp. 840-841). The vault in the Safe Deposit Company, in which the securities were kept was four feet high, two feet wide, with two shelves, making three compartments. In the lower compartment there was stored the leather trunk which was carried back and forth each day from the office (p. 127). *The other shelves were not divided into secret compartments, and no part of the interior of the vault was under lock and key.* The securities referred to, as well as the envelope, which was fastened to the securities by means of a rubber band, were contained in one of the two upper sections of the vault. These envelopes by reason of the changes in the securities from time to time became worn out and other envelopes were substituted in their place. These envelopes bore the words upon them: "Escrow, Kessler & Co., Manchester" (Record, pp. 308-309). The changes in the securities were also recorded in a book kept in the office called a loan book (p. 335). All of the securities referred to were in the vault of the bankrupts in New

York, except the United Lighting & Heating shares, which were in Manchester, and the Elton shares which were in the possession of the bankrupts' brokers at Colorado Springs (p. 314) and were not delivered to the Manchester house until after the general assignment was made.

From the foregoing it clearly appears that the securities were in the actual physical possession of the bankrupts. They had never been delivered into the possession of the Manchester house or to any one on their behalf until the 25th of October, 1907. It further appears that every act of ownership possible was performed by Kessler & Company. They sold the securities when they could sell them and hypothecated them as the demands of the business required, without consultation with Manchester (Master's Rep., p. 1038). Collections of coupons and interest accruing from the collateral in the escrow were collected by the bankrupts and deposited in their own bank account, and the principal of notes, when paid by the maker, also went into their bank account; that was so whether it was notes, or bonds, or stocks, or dividends, or coupons, or money paid on account of principal (Master's Rep., 1038).

Under such circumstances the authorities are clear that no valid legal pledge existed (*Casey v. Caberoc*, 96 U. S., 467; *Wilson v. Little*, 2 N. Y., 443; *Buffalo German Insurance Co. v. Third National Bank*, 162 N. Y., 170; *Security Warehousing Co. v. Hand*, 206 U. S., 415).

Possession is of the essence of a pledge; and without it no privilege can exist as against third persons.

Casey v. Cavaroc, 96 U. S., 467.

Casey v. Nall. Park Bank, 96 U. S., 492.

Casey v. Schuchardt, 96 U. S., 494.

The doctrine of

Casey v. Cavaroc, supra,

was reaffirmed in

Security Warehousing Co. v. Hand,
206 U. S., 421.

The Court said:

“The general law of pledge requires possession and it cannot exist without it,” and in head note, held “that where there is no delivery or change of possession receipts issued by a Warehouse Company are not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned therein.”

This distinguishes

Union Trust Co. v. Wilson, 198 U. S.,
530.

This has also been the law of this State since 1849,

Wilson v. Little, 2 N. Y., 443,

and has been reaffirmed in

Buffalo Bank v. Third Nat'l Bank, 162
N. Y., 170.

There the Court of Appeals said by

GRAY, J.:

“If we assume the existence of a contract between the defendant bank and Levi (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession and until it was in fact pledged to the bank by delivery. Possession is of

“ the essence of a pledge, in order to raise a
“ privilege against third persons.”

Citing

Casey v. Cavaroc, supra.

Wilson v. Little, supra.

Upon the authorities, therefore, there is no difference between the law of the United States as established by *Carey v. Cavaroc* and the law of the State of New York (*Davenport vs. City Bk., 9 Paige, 12*).

Wilson vs. Little, 2 N. Y., 446:

“ Possession must uniformly accompany a
“ pledge. The right of the pledgee cannot
“ otherwise be consummated. And on this
“ ground it has been doubted whether incor-
“ poreal things like debts, moneys in stocks,
“ etc., which cannot be manually delivered,
“ were the proper subjects of a pledge. It is
“ now held that they are so; and there seems
“ to be no reason why any legal or equitable
“ interest whatever in personal property may
“ not be pledged; provided the interest can be
“ put by actual delivery or by written trans-
“ fer into the hands or within the power of
“ the pledgee, so as to be made available to
“ him for the satisfaction of the debt.

“ Goods at sea may be passed in pledge by
“ a transfer of the muniments of title, as by
“ a written assignment of the bill of lading.
“ This is equivalent to actual possession, be-
“ cause it is a delivery of the means of ob-
“ taining possession.”

Christia v. Atlantic & N. P. R. R.,
133 U. S., 233.

“ A pledge in the legal sense requires to be
“ delivered to the pledgee. He must have
“ possession of it. * * * In the case of
“ stocks and other choses in action the
“ pledgee must have possession of the cer-
“ tificate or other documentary title with a
“ transfer executed to himself, or in blank

"unless payable to bearer, so as to give him
 "the control and power of disposal of it.
 "Such things are then called pledges, but
 "more generally collaterals; and they may
 "be used in the same manner as pledges
 "properly so called. If there is no transfer
 "attached to or accompanying the document
 "it is imperfect as a pledge, and requires a
 "resort to a court of equity to give it effect.
 "These propositions are so elementary that
 "they hardly need a citation of authorities
 "to support them."

That the securities involved were bonds payable to bearer, notes and shares endorsed so as to pass title by delivery does not differentiate this case from the general rule. The delivery into the physical possession of this defendant was still necessary.

Some of the securities required endorsement, others did not, being payable to bearer; those requiring endorsement were endorsed, not for the defendants, but so that they might be used by the New York house as occasion required in case of sale, or in case the same were hypothecated. This is the usual method of conducting the banking business; that all their securities should be negotiable in form so as to make good delivery in case of sale, or good collateral in case of pledge to other banks.

This being the situation, Kessler & Co. transferred these securities from their *right* hand to their *left* hand, endorsed on an envelope "Escrow for Kessler & Co., Limited," and fastened it with a rubber band to the securities, continued to hold them as before, and maintained every right of ownership over them which they theretofore had.

The Manchester house wished to have security without taking possession of the property, and Kessler & Co. wished to secure them without giving possession of the collateral.

Meanwhile the general creditors were dealing

with Kessler & Co., believing that the latter owned the property, and gave them credit accordingly.

Under the authorities, therefore, the defendant has failed to establish a common law pledge of the securities by the plan set forth in the correspondence commencing June 30, 1903.

POINT II.

The legal pledge having failed it cannot be supported either as an equitable pledge, an equitable mortgage or a declaration of trust.

The act provides, § 60a, that a "transfer" of any property of the bankrupt shall be void under specified conditions; a "transfer" is defined, § 1 (25) to include "the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

§ 67a provides that "Claims which for want of record or for other reasons would not have been valid *liens* as against the claims of the creditors of the bankrupt, shall not be *liens* against his estate."

We do not suppose it will be contended that the transfer of possession on October 25th did not constitute "a transfer" within the meaning of the Bankruptcy Act; such a contention would be impossible in view of the express application of the definition to changes in the possession, or parting with the possession, or every other mode of disposing of the possession, of property. Undoubtedly the

appellee's claim is that, eliminating entirely what took place on October 25th, nevertheless a lien existed by virtue of the correspondence in 1903 and the acts pursuant to that correspondence. We say that whatever rights between the parties that correspondence may have created, they were not such rights as are saved from the operation of the Bankruptcy Law.

ANSWERING EQUITABLE PLEDGE THEORY.

The necessary basis for any equitable lien is an express agreement to subject certain property thereto. As possession is a *sine qua non* for a legal pledge, so an *express agreement to deliver possession* is a *sine qua non* for an equitable lien in the nature of pledge.

In this case we say there was no express agreement to deliver possession at any time; which is manifest from the letters themselves. Nor is there any implied agreement to deliver; certainly none to deliver on demand, because the clear intent was that possession should remain in the New York house—since possession was absolutely essential to the bankrupts' continued dealing in and with the securities. Moreover, the correspondence in no wise specified the amount of drawings, and there was no legal obligation on Manchester to accept at all, nor on the New York house to draw; and if the bankrupts furnished "cover" for their drafts, manifestly all the appellee's interest in the securities immediately ceased. Certainly until the bankrupts failed to furnish "cover"—*in other words, failed to meet their obligations, and thereby as bankers became insolvent*, Manchester could not, even by implication, spell out a right to possession. This was the conclusion of the Master and also of the District Court (pp. 1049, 1091).

The following case and others therein cited are authorities for the foregoing proposition:

In re Great Western Manufacturing Co., 18 Am. B. R., 259.

“ But the theory and purpose of the Bankruptcy Act were to distribute the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors of the same class. To this end every judgment procured or suffered against him, every transfer by an insolvent of any of his property, every conceivable way of depleting it after the commencement of the four months the effect of which is ‘to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class,’ is declared to be a voidable preference if the creditor has reason to believe that a preference is intended thereby. Act July 1, 1898, c. 541, and Act Feb. 5, 1903, c. 487 (30 Stat., 562, 32 Stat., 799) (U. S. Comp. St., 1901, p. 3445; U. S. Comp. St. Supp., 1905, p. 689); *Swartz v. Fourth National Bank*, 8 Am. B. R., 673; 54 C. C. A., 387, 389, 117 Fed., 1, 3. An agreement to mortgage or to transfer is not a mortgage or a transfer. The title remains in the owner unincumbered by the mortgage until the mortgage or transfer is effected. When the agreement is made before, and the mortgage or transfer within, the four months, the title stands unincumbered by the latter at the commencement of the four months, and the proceeds of that title are pledged under the bankruptcy law for the benefit of all the creditors *pro rata*. Any subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or

“ transfer should be adjudged voidable if it
 “ is otherwise so, and that the mortgagee or
 “ transferee should be remitted to his original
 “ agreement. In this way the property at
 “ the commencement of the four months and
 “ its value may be preserved for the general
 “ creditors, and the mortgagee or transferee
 “ may retain every lawful advantage his
 “ earlier contract confers upon him. Any
 “ other course of decision opens a new and
 “ enticing way to secure preferences, nulli-
 “ fies every provision of the law to prevent
 “ them, and invites fraud and perjury. Hold
 “ that transfers within four months in per-
 “ formance of agreements to make them be-
 “ fore that time do not constitute voidable
 “ preferences, and honest debtors would
 “ agree with their favored creditors before
 “ the four months that they would subse-
 “ quently secure them by mortgages or trans-
 “ fers of their property, and just before the
 “ petitions in bankruptcy were filed they
 “ would perform their agreements. Dis-
 “ honest men who made no such contracts
 “ might falsely testify that they had done
 “ so and thus by fraud and perjury sustain
 “ preferential transfers and mortgages made
 “ within the four months to relatives or
 “ friends. The great body of the creditor,
 “ would be left without share in the prop-
 “ erty of their debtor and without remedies
 “ and a law conceived and enacted to secure
 “ a fair and equal distribution of the prop-
 “ erty of debtors among their creditors would
 “ fail to accomplish one of its chief objects.
 “ This Court will hesitate long before it ap-
 “ proves a rule so fatal to the most salutary
 “ provisions of the bankruptcy law, and our
 “ conclusion is:

“ A mortgage or transfer of his property
 “ by an insolvent debtor within four months
 “ of the filing of a petition in bankruptcy
 “ against him, which otherwise constitutes
 “ a voidable preference, is not deprived of
 “ that character or made valid by the fact
 “ that it was executed in performance of a

"contract to do so made more than four
 "months before the filing of the petition.
 "Wilson v. Nelson, 183 U. S., 191, 198, 7
 "Am. B. R., 142, 22 Sup. Ct., 74, 46 L. Ed.,
 "147; *In re Sheridan* (D. C.), 3 Am. B. R.,
 "554, 98 Fed., 406; *In re Dismal Swamp*
 "Co. (D. C.), 14 Am. B. R., 175, 135 Fed.,
 "415, 417, 418; *In re Ronk* (D. C.), 7 Am. B.
 "R., 31, 111 Fed., 154; *Pollock v. Jones*, 10
 "Am. B. R., 616, 124 Fed., 163, 61 C. C. A.,
 "555; *Anniston Iron & Supply Co. v. Annis-*
 "ton Rolling Mill Co. (D. C.), 11 Am. B.
 "R., 200, 125 Fed., 974; *Johnston v. Huff*,
 "Andrews & Moyler Co., 13 Am. B. R., 287,
 "133 Fed., 704, 66 C. C. A., 534; *In re Man-*
 "del (D. C.), 10 Am. B. R., 240, 127 Fed.,
 "863. In *Wilson v. Nelson*, 183 U. S., 191,
 "198, 7 Am. B. R., 142, 22 Sup. Ct., 74, 46
 "L. Ed., 147, the debtor had given an irre-
 "vocable power of attorney to the creditor
 "to confess judgment many years before.
 "Judgment was confessed under it within
 "the four months, and the Supreme Court
 "held it to be a voidable preference. *In re*
 "*Sheridan* (D. C.), 3 Am. B. R., 554, 98 Fed.,
 "406; *In re Ronk* (D. C.), 7 Am. B. R., 31,
 "111 Fed., 154, and *In re Dismal Swamp Co.*
 "(D. C.), 14 Am. B. R., 175, 135 Fed., 415,
 "417, 418, mortgages executed within the
 "four months in performance of agreements
 "to give them made more than four months
 "before the filing of the petitions in bank-
 "ruptcy were held to be voidable preferences,
 "and this view seems to be sustained by the
 "terms of the Bankruptcy Act, by the more
 "cogent reasons, and by the weight of au-
 "thority."

Page v. Rogers, 211 U. S., 575, was a case where
 this Court found it unnecessary to make the square
 decision, but indicated pretty clearly, we think, its
 attitude on the question. This Court there said (p.
 578):

"It is, therefore, argued that as the con-
 "veyance, on June 1, 1903, was in perform-

“ance of this agreement, which antedated
 “the bankruptcy proceedings by more than
 “four months, it cannot be regarded as a
 “preference. The facts, however, do not
 “raise the question which was argued. Upon
 “a proper interpretation of the evidence we
 “need not determine whether an insolvent
 “debtor may make an agreement to convey
 “a substantial portion of his assets to a
 “favored creditor, keep that agreement se-
 “cret for more than four months, and then
 “execute it in fraud of the rights of his other
 “creditors, in favor of a creditor who then
 “has reasonable cause to believe that he is
 “receiving a preference.”

Wilson v. Nelson, 183 U. S., 191, was a case in Wisconsin where Johnstone in February, 1885, loaned \$9,000 to Nelson and as security took Nelson's note payable in five years and an irrevocable power of attorney to confess judgment after maturity of the note. Nelson was a trader. Interest was paid up to November, 1898, for a long time prior to which date Nelson had been, as he well knew, insolvent. On November 21, 1898, Johnstone caused judgments to be duly entered upon the power of attorney, upon which an execution levy was made, and on December 15th, the property was sold for \$4,400, which sum was applied in part payment of the judgment. All this was done without Nelson's knowledge or consent. On December 10th an involuntary adjudication in bankruptcy was made against Nelson, the act of bankruptcy alleged being the permission to Johnstone to obtain a preference by such judgment. This Court held that the preference must be set aside.

Security Warehousing Co. v. Hand, 206 U. S., 415, affirmed the judgment of the Circuit Court of Appeals, Seventh Circuit. The Circuit Court of Appeals there said:

“The appellants * * * assert that if
 “they have neither negotiable receipts * * *
 “nor a pledge * * * nevertheless they
 “have equitable liens which entitle them to

" the possession of the property as against
 " the trustees. * * * Section 67a vitiates
 " as liens all claims which for want of record
 " or for other reasons the bankrupt's creditors
 " might have avoided as liens: that is, no
 " secret liens or equities shall prevail against
 " the trustees that were not good against the
 " general unsecured creditors represented by
 " the trustee. * * * The liens thus saved
 " are liens, not promises to give liens, not
 " equitable claims, that what ought to have
 " been done shall be considered done, but
 " liens perfected according to law."

While this particular feature of the case was not alluded to by this Court, except in passing, it was not disturbed—as is noted by Archbold, J., in

Fourth Street Bank vs. Millbourne, 172
Fed. Rep., 177 (C. C.A., 3rd Circuit).
Re Sheridan, 98 *Fed.*, 406.
Copeland v. Barnes, 147 *Mass.*, 388.

This last case defined a similar provision in the insolvent laws of Massachusetts.

The case was this. A buyer of goods gave as security to lender of purchase money, a bill of sale running to purchaser, which the lender believed to be a mortgage.

Learning afterwards that it was not a mortgage he obtained one and later on took possession of the property.

These later transactions were within six months of the insolvency proceedings. * * * The Court said:

" If no delivery of the goods is made, it can
 " be no more than an agreement for a pledge
 " or mortgage. Such agreement made at the
 " time when a debt is contracted will not
 " avail to protect the actual pledge or transfer
 " of the property, when made from the
 " operation of the statute against preferences
 " by an insolvent debtor.
 " The statute makes no exception in favor
 " of securities given in pursuance of a previ-
 " ous agreement, but declares all transfers

"and conveyances void if made within six
 "months and under the circumstances
 "stated."

In

Bank of Leavenworth v. Hunt, 78 U.
 S., 394,

it was held that an agreement between parties insolvent and a bank, whereby the insolvents, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promise its president to deliver to the bank whenever it may desire, the entire stock of goods which they may have at the time on hand in a store kept by them, the goods being in the meantime retained in their possession, is void as against their other creditors.

Such an agreement does not create any lien upon the property or entitle the bank to any preference over other creditors in the event of the debtors being afterwards proceeded against under the Bankrupt Act.

Citing

Griswold v. Sheldon, 4 Comstock, 581.
Wood v. Lowry, 17 Wendell, 492.

There is another basic principle of equity jurisprudence upon which the theory of equitable lien must rest. That is, there must be specific and definite property to be charged with the lien.

This element is entirely lacking in this case.

The arrangement made between the parties contemplated the sale and other use of the securities as originally deposited in June, 1903.

The letter of the Manchester house gives this right to the New York house in express terms.

The right was not only accorded, but both parties so acted, for thereafter the New York house, from time to time, took from these securities and put others in their place. This was done without previous consultation with Manchester, as to what se-

curities should be taken out and what securities should replace those so removed.

After the change had been made the New York house would notify the Manchester house, and at no time did the latter make any protest or criticism of such acts.

The changes thus made were so numerous that of the four different classes of securities constituting the "escrow" in June, 1903, there were twenty items delivered to Henry Kessler, October 25, 1907, one only remaining unchanged (Master's Report, p. 1051, fol. 3132).

This being the fact what specific securities were charged with a lien in June, 1903?

Of course, under the plans arranged between the houses there was no agreement for a lien on any specific property, nor could there be; the promise was vague and indefinite as to the property to be charged with a lien.

The arrangement really was that the New York house should keep not certain specified securities on hand, but undetermined property of sufficient value to enable Kessler & Co. of Manchester to repay themselves for acceptances in case of necessity.

This falls far short of the exact description of property to be charged with the lien.

On this subject Judge Hough said (p. 1091):

"As for bundling up the stocks and bonds,
 "putting them in an envelope, leaving the
 "envelope in the New York Kessler's safe
 "deposit box and changing the items at will,
 "—this process, as a method of giving
 "'security,' is about equivalent to one man
 "advising another that the latter may con-
 "sider as his security whatever may at
 "any time be in the first speaker's right
 "hand trousers' pocket * * * The intent
 "of the parties seems to me quite plainly
 "this, viz : that Kessler of New York should
 "keep on hand—not certain specified secur-
 "ities, but property of sufficient value to
 "enable Kessler of Manchester to repay him-
 "self for acceptance of long drawings, in

“ case he either preferred to do so or found
 “ it necessary * * * and the final irresist-
 “ ible inference is that the ‘ security ’ was to
 “ pass into the control of the creditor * * *
 “ only when it was deemed advisable to take
 “ it in order to prevent other creditors from
 “ getting some or all of the same.”

Passing this point of definiteness for the purposes of argument, will a court of equity uphold on the theory of equitable lien, an attempted pledge which fails at law, when the rights of creditors are involved?

Whether this question must be answered by the decisions of this Court or the Court of Appeals of New York is immaterial, as they are in harmony.

Casey v. Cavaroc, 96 U. S., 467.

Security Warehousing Co. v. Hand-
206 U. S., 415.

Wilson v. Little, 2 N. Y., 446.

Buffalo G. I. Co. v. Third Natl. Bank,
162 N. Y., 163.

Casey v. Cavaroc held possession to be of the essence of a pledge; and without it no privilege can exist as against a third person; that this is the common law as well as the civil law, *Code Napoleon* and the *Civil Code of Louisiana*; that the thing pledged may be in the temporary possession of the pledgor as special bailee without defeating the legal possession of the pledgee; but where it has never been out of the pledgor's actual possession and has always been subject to his disposal by way of collection, sale, substitution or exchange, no pledge or privilege exists as against third persons; that although the pledgee may by action against the pledgor or his heirs under the law of Louisiana recover possession of the thing, he cannot sustain a privilege thereon as against creditors or against a bank receiver or an assignee in bankruptcy who represents them; that equity will not regard a thing as done which has not been

done when it would injure third parties who have sustained detriment and acquired rights by what has been done.

The Court, having carefully examined the law relating to pledges, beginning with the New York decisions, and pointing out that possession was the one essential to a valid pledge, says, page 486:

“It must not be overlooked that the Credit Mobilier has no other claim to the securities in question but that of a pledge. A pledge and possession which is its essential ingredient must be made out, or their privilege fails. *An agreement for a pledge raises no privilege.* There is no mortgage; for the title of the securities was never transferred to them.”

Upon the point as to whether the assignee in bankruptcy may set up want of privilege, the Court had this to say:

“Whilst it is generally true that an assignee for the benefit of creditors holds the property assigned subject to the same equities as the debtor or assignor held it, it is not universally true. Many transactions would be binding on the latter which would not be binding on the assignee. All sales and securities made for the actual purpose of defrauding creditors are of this class.
“* * *

“Without the privilege of right or preference the Credit Mobilier has no claim to hold the securities in question as against the other creditors. How, then, can it set up such claim against a receiver? The receiver does not represent the bank alone. *He represents all parties. He represents the law which takes charge of the property for the benefit of all creditors according to their respective and mutual rights.* Suppose no receiver had been appointed and when the bank failed it had called the creditors together and laid all its assets on a table, could the Credit Mobilier, in presence of the other creditors, have placed its hands

“on the securities in question and claimed them by right of any privilege or preference. It certainly could not have done so if it had no privilege as against them. * * * The existence of a receiver or trustee for all did not change it. That one essential thing which the law requires for the subsistence of the privilege, namely, possession, was wanting. Other formality might have been dispensed with. But possession is essential—made so by the express terms of the law * * *.”

“The requirement of possession is an inexorable rule of law adopted to prevent fraud and deception; for if the debtor remain in possession the law presumes that those who deal with him do so on the face of his being the unqualified owner of the goods.”

In *Security Warehousing Co. v. Hand*, 206 U. S., 415, the same point was made by counsel as is now made by the defendants.

The actual possession of the property was not in the bailee. The constructive possession was; but the Court looked behind all the legal machinery to the basic fact of possession, and held that as there was no change of possession there was no pledge.

Thereupon the pledgees or those in privity with them set up the *equitable lien theory*, claiming that it was superior to the title of the trustee and citing many cases which may be found on the defendant's brief.

The Court wiped out the theory of equitable lien in a word:

“Under the circumstances of this case we are satisfied there was no valid pledge and no equitable lien in favor of the intervenors which would take precedence of the title of the trustee by virtue of the special provisions of the bankrupt act.”

The following cases are also in point:

Ryttenberg v. Schefer, 11 Am. Bk., 664, which distinguishes between the common law lien and equitable lien, holding that common law lien by

way of pledge required possession actual or constructive; and that equitable lien could not be maintained because there was no specific agreement therefor.

Holt, J.:

"All the cases which have been called to my attention, in which the facts are somewhat similar to those in the case and in which an equitable lien has been upheld, are cases in which either there was a *specific agreement* for a mortgage or lien of some kind, or the goods although remaining about the premises of the party giving the lien were set apart in a lot or room leased to the party to whom the lien was to be given and were delivered into the custody and control of an agent of the person to whom the lien was to be given."

"The simple fact in the case is that Radon & Co. *wanted to obtain advances without delivering possession of the property*, and Schefer, Schramm and Vogel *wanted to acquire a lien without taking possession of the property*."

"It was one of the numerous attempts to give a lien, by owners of property while retaining the apparent ownership of it."

"The law denies any validity to such arrangement whenever bankruptcy occurs and the rights of general creditors are involved."

"As is well stated in the leading case of *Casey vs. Cavaroc*, 96 U. S., 467. * * *

"The requirement of possession *is an inextinguishable rule of law* adopted to prevent fraud and deception, for if the debtor remains in possession, *the law presumes* that those who deal with him do so on the faith of his being the unqualified owner of the goods."

Re Sheridan, 98 Fed., 406:

"An agreement to pledge personal property as security for a debt is not executed when the goods are not delivered to the creditor, nor set apart and treated as his property, and where the creditor takes possession of

“ the property a few days before the filing of
 “ a petition in bankruptcy against the debtor,
 “ the transaction is voidable as a preference
 “ notwithstanding that the original agree-
 “ ment was made more than four months
 “ before that time.”

Another case very much like the present is

Nisbit v. Macon Bank, 12 Fed. Rep.,
 686.

Purdee, J.:

“ Equity will not regard a thing as done
 “ which has *not* been done, where it would
 “ injure third parties who have sustained
 “ detriment and acquired rights by what has
 “ been done.”

In order to tide over the Macon Bank and Trust Company which had become involved, Cubbedge, Haslehurst & Co. and said bank arranged to conduct the business of the bank and agreed to give security therefor by deposit of stock script of the firm in the bank. Two of the members of the firm were president and cashier respectfully of the bank. The Court said:

“ Under this arrangement, various certifi-
 “ cates of stock of the bank belonging to the
 “ firm were replaced by Lockett, partner in
 “ the firm and Cashier in the bank, from time
 “ to time in a separate box under his own
 “ control in the vault of the firm; but it does
 “ not appear that any transfer or authority
 “ to transfer was ever given, nor that the cer-
 “ tificates were retained by the bank as a cer-
 “ tain deposit, but it does appear that the
 “ firm retained and exercised the right of
 “ withdrawal and substitution at their own
 “ convenience and without consulting the
 “ bank.”

It was held that the transfer of the securities having taken place within four months, was void under Section 5128, Rev. St., and that the person

receiving had reasonable cause to believe that the pledgor was insolvent. * * * The Court, continuing, said:

“For years the verbal agreement to keep the bank secured with its own scrip was allowed to run with no note, no transfer, nothing but Lockett’s tin box, which he emptied and replenished as the exigencies of the case required, when, five days before the crash, the most formal of notes and formal of pledges were put in writing, duly witnessed, and the stock transferred on the books besides.

“The parties had slept too long on this agreement for a continuous hypothecation to have been awakened without occasion of some kind.”

In

Fourth St. Natl. Bank v. Melbourne Mills Co., 172 Fed., 177,

the Circuit Court of Appeals for the Third Circuit said by Archibald, J.:

“It is however contended that there being an intent to pledge, an equitable lien was at least created, which entitles the certificate holders to the fund. It is difficult to see how a transaction, which, for want of delivery is ineffective as a pledge, can be pieced out, so as to make it hold as something else.

“There would be little left to the established doctrine with regard to pledges, if that was the case; and it is somewhat singular that, in all the litigation, where pledges of personal property has been upset, for want of a delivery, no one should have discovered this easy way out. This is not to say that an equitable lien, under some circumstances, may not exist; but only that there is nothing to support it here. It never arises or is enforced except against property in the hands of a party to the original transaction out of which it is claimed to grow, or his voluntary representatives, or one who has notice

“ of it and is affected with it as a superior
 “ right; within which all the cases cited in
 “ support of it will be found to fail (19 Am.
 “ & Eng. Enc. (2nd Ed.) 36). It is not good
 “ as against a trustee in bankruptcy, taking
 “ title, in the interest of creditors, by opera-
 “ tion of law, as is the case here.”

Zartman v. Bank, 189 N. Y , 267,

in which the Court of Appeals said, p. 271:

“ If a lien was created by the mortgage
 “ upon property not in existence at its date,
 “ possession after it came into existence was
 “ of no importance. If no lien was created
 “ by the mortgage upon such property, the
 “ taking of possession pursuant to its terms
 “ did not create one as against general cred-
 “ itors, *who are presumed to have dealt with*
 “ *the mortgagor in reliance upon its absolute*
 “ *ownership of the stock on hand.* While
 “ the record of the mortgage was notice to
 “ all, it was notice of all its terms, which in-
 “ cluded the right of disposition for the use
 “ and benefit of the mortgagor, with no duty
 “ to apply the avails upon the mortgage in-
 “ debtedness. If the question had arisen be-
 “ tween the parties to the mortgage, equity
 “ might recognize a contract to give a lien
 “ and treat it as an actual lien, but it arises
 “ between the mortgagee and the general un-
 “ secured creditors, who had little, if any-
 “ thing, to rely upon except the shifting stock,
 “ which, directly or indirectly, they them-
 “ selves had furnished. The credit extended
 “ by them enabled the mortgagor to carry on
 “ business, and if the product of that credit
 “ goes to the mortgagee, not only are they
 “ helpless, but, if the law is so declared, here-
 “ after manufacturing corporations needing
 “ credit will be helpless also.” * * * “ As-
 “ suming that a court of equity may uphold
 “ and give effect to such a mortgage when
 “ the rights of the mortgagor and mortgagee
 “ only are involved, it will not aid the mort-
 “ gagee at the expense of subsequent creditors
 “ when their rights are involved. It will not
 “ treat a contract to give a mortgage upon a

" subject to come into existence in the future
 " as a mortgage actually then given, if the
 " result would deprive the general creditors
 " with superior equities so far as after-ac-
 " quired property is concerned, of their only
 " chance to collect debts. It is only when the
 " rights of third parties will not be preju-
 " diced that equity, treating as done that
 " which was agreed to be done, will turn a
 " contract to give a mortgage on property to
 " be acquired into an equitable mortgage on
 " such property as fast as it is acquired and
 " enforce the same accordingly against the
 " mortgagor, his representatives and assigns.
 " In other words, the agreement and inten-
 " tion of the parties to a mortgage upon prop-
 " erty not yet in existence will be given
 " effect by a court of equity so far as prac-
 " ticable, provided no interest is affected ex-
 " cept that of the mortgagor and mortgagee,
 " who entered into the stipulation, but equity
 " closes its doors and refuses relief if the
 " interests of creditors are involved. The re-
 " sult thus announced is founded on prin-
 " ciple and sanctioned by authority. [Kribbs
 " v. Alford, 120 N. Y., 519, 524; Wisner v.
 " Ocumpaugh, 71 N. Y., 113; McCaffrey v.
 " Woodin, 65 N. Y., 459; Jones on Chattel
 " Mortgages (4th ed.), 170; Beall v. White, 94
 " U. S., 382, 386.] " * * *

" As we have seen, equity takes hold of the
 " subject with a strong hand in order to
 " enable the mortgagee to get what the mort-
 " gagor intended to give, provided no other
 " interest is involved, but when the creditors
 " of the mortgagor enter the field equity goes
 " no farther than the law and will simply
 " enforce a lien if it exists without attempt-
 " ing to perfect it if something is lacking to
 " make it complete. *The taking of possession*
 " *by the mortgage is relied upon by the ap-*
 " *pellant to 'ripen the lien,' which, as is con-*
 " *ceded, was inchoate before. If the contract*
 " *between the mortgagor and mortgagee fell*
 " *short of creating a lien, as was clearly the*
 " *case, the act of taking possession did not*
 " *enlarge, perfect or complete it. A mortga-*
 " *gee cannot add to his title by his own act.*"
 " * * * "When the general creditors

“intervened through the plaintiff, the mort-
 “gagee was simply in possession with title
 “to the property that was in existence when
 “the mortgage was given, but with no title
 “to the shifting stock subsequently acquired.
 “As to that property, it had only the prom-
 “ise of the mortgagor, which equity could
 “help out by treating as done what was
 “agreed to be done, but which it will not
 “help out to the injury of unsecured cred-
 “itors. The rights of the defendant, incom-
 “plete when it took possession, are incom-
 “plete still, for they can be perfected only by
 “the aid of equity, and equity refuses to
 “help under the circumstances of this case.”

The reason for what the courts have defined as
 the “inexorable rule of law” that possession of the
 pledge must be in the pledgee will be found clearly
 set forth in the latest work on this subject

Van Zile's Bailments and Carriers.

Section 237a. “The delivering of the property
 pledged by the pledgor to the pledgee *and the ac-
 ceptance and continued possession of the property
 by the pledgee, is that which gives to the world
 notice of the pledgee's interest and the extent of the
 rights to the property in possession.* These stand
 in the place and stead of the recording of a mort-
 gage or the filing of a lien, as it is well understood
 principle of law that possession of property is notice
 to all the world of all the rights and interests of the
 possessor in the property possessed.”

“It has been noticed that in the pledge or pawn
 there is no recording of the same in a public record
 kept in some public office: there is no filing of notice
 of the lien which the pledgee has upon the property.
 In the place of this, and as effectual as all this would
 be, is the fact that the property had been delivered
 into the possession of the pledgee and is held by him
 as security for the indebtedness.”

“Other creditors of the pledgor may not actually
 know the extent of the claim or the conditions of

the pledge, but the law holds them, because of this delivery and possession to a full knowledge of all that pertains to the holding of the pledged property by the pledgee."

"*Bona fides* will not avail pledgee in absence of delivery and possession."

"Section 238. *As between the parties to a pledge a contract to pledge would be binding* even if the property had not been delivered and such a contract resting upon a valuable consideration could be enforced; for the reason, among other things, that 'equity considers substance rather than form.' But before the doctrine of equitable pledge can be applied there must be a contract showing that the debtor designed to subject the particular property to the payment of the debt."

"*But as against subsequent purchasers in good faith or the creditor of the pledgor, as we have already seen, delivery is an essential; and as to such persons, the pledgee could not enforce the contract of pledge; there would be no notice of the existence and the pledgee would not be held to be a bona fide holder of the property.*"

Another case which supports the contention of the plaintiff is

Skelton v. Coddington, 185 N. Y., 88.

The case related to the validity of a chattel mortgage, to support which the doctrine of equitable lien was advanced.

Inter alia the Court, by Judge Cullen, said, page 90:

"An agreement between the parties by
 "which the mortgagor was to carry on a re-
 "tail store, making purchases from time to
 "time and selling off in the ordinary manner,
 "the mortgagee all the time retaining a lien
 "on the whole stock by way of mortgage
 "under which he could, upon default, take
 "possession of the remaining goods and sell
 "them for the payment of his debt, was held

" void as against creditors (*Edgell vs. Hart*,
 " 9 N. Y., 213). This last case may be some-
 " what limited by the subsequent decision in
 " *Brackett vs. Harvey* (91 N. Y., 214), but
 " nevertheless it is unquestionably the law that
 " where there is an agreement that the mort-
 " gator may sell for his own benefit the mort-
 " gage is fraudulent as a matter of law
 " (*Southard vs. Benner, supra; Polls vs. Hart*,
 " 99 N. Y., 168; *Haugen vs. Hachemeister*, 114
 " *Id.*, 566; *Mandeville vs. Avery*, 124 *Id.*, 376).
 " The instrument under which the plaintiff
 " claims his lien expressly provided that the
 " mortgagor might sell and dispose of the
 " property and apply the proceeds to the pay-
 " ment of the debt, 'excepting such portion
 " thereof as is necessary for the expenses of
 " the business or as he or they may need to
 " replenish or increase the said stock of goods.'
 " The plaintiff contends that under the au-
 " thority of the Brackett case the agreement
 " that the plaintiff should apply the pro-
 " ceeds of the sales of the mortgaged
 " chattels to the purchase of other goods did
 " not render the mortgage void. I do not
 " think the decision goes to that extent. The
 " agreement in that case was a peculiar one.
 " While it did provide for the application of
 " the proceeds of sales to new purchases, it
 " also provided that new mortgages should be
 " given from time to time on the chattels sub-
 " sequently purchased. Such new mortgages
 " were in fact given, and it was the validity
 " of these later mortgages that was impeached
 " in the suit then before the Court. As was
 " pointed out in the opinion, when these
 " mortgages were given the mortgagee was a
 " creditor of the mortgagor, whatever may
 " have been the misapplication of the proceeds
 " of sales under the earlier mortgages, and
 " the parties had the right to contract on the
 " then existing status, because there was no
 " creditor in a position to question the validity
 " of the contract. In the course of the discus-
 " sion it was said that it was perhaps a just
 " inference from the contract between the
 " parties that the mortgagor might sell and
 " apply the proceeds towards new purchases
 " on condition that the substituted property

"should be brought in and subjected to the
 "mortgage; that this did not injuriously
 "affect the rights of creditors, as the substituted property would represent the property
 "sold and that, therefore, it was not necessary to hold the agreement fraudulent. This
 "statement was not necessary to the disposition of the cause, and I am frank to say that
 "I should be loth to accede to it in its entirety. The substituted property might or
 "might not equal in value the property realized from the lien of the mortgage by sale.
 "Even in the most favorable view it would
 "give the mortgagor unlimited power of speculation in the disposition of the mortgaged property. The property might be
 "wasted by ill-judged speculation, even though the mortgagor acted in good faith.
 "However this may be, the agreement now before us goes a step further than that
 "in the Brackett case. It does not require all the proceeds of the mortgaged
 "chattels to be applied either on the mortgage debt or to the acquisition of new
 "property, but only the surplus after deducting the expenses of carrying on the business.
 "We need not consider whether the expenses of the business which the mortgagor was
 "authorized to deduct from the sales would include compensation for his own services
 "or not. Plainly they would comprehend rent, clerk hire and similar items. Of such a provision contained in the agreement it is idle
 "to argue that if the mortgagor acted honestly and lived up to his agreement the property
 "newly acquired would be the equivalent of that disposed of by sale. On the contrary,
 "it is not only possible, but, if the business proved unsuccessful, probable that a large
 "part of the mortgaged property would be sold without the proceeds being applied
 "either to the reduction of the debt or to new property substituted for that disposed
 "of."

The reasoning of Judge Cullen in the Skelton case and the conclusions reached by him were affirmed by this Court in

Frank v. Vollkommer, 205 U. S., 529.

To summarize; our contention as to this equitable pledge theory is this:

There is no such thing as an equitable pledge; one either has made a pledge or he hasn't. Support for the existence of such a contradiction as "equitable pledge" must be found, if at all, in the fact that equity in some circumstances will consider as done what was agreed to be done. But that doctrine has no application for these reasons:

(a) If X borrows money from Y, agreeing to pledge stock therefor *in futuro*, but doesn't pledge it as promised, Y cannot have specific performance because his legal remedy is adequate in every conceivable case except where X becomes bankrupt; and that is just the one case where equity would not give it because there is no justice in singling out *one of many purely contract creditors*, and giving him everything.

(b) The bankrupts never agreed to give, nor did Manchester stipulate to receive, possession (except after financial embarrassment had intervened)—and hence there was no contract, relative to possession, for equity to enforce by deeming it performed.

ANSWERING THE THEORY OF AN EQUITABLE MORTGAGE.

This is the theory adopted by the majority of the Circuit Court of Appeals.

1. The parties did not intend to create a mortgage, but only a pledge with peculiar features, viz., possession to remain in the pledgor with absolute power of disposal.

In New York, as elsewhere, a mortgage of personal property is a transfer of title subject to be divested on condition subsequent, viz., by payment of the debt. The parties intended no such thing:

The intention of the parties is shown by their correspondence; this commenced in February, 1903, and

the first three letters are set forth in full above (pp. 10-11). The succeeding letters were as follows:

In the letter of the 23d December, 1903, from Manchester to New York, specifying the form of certificate which they desire Kessler & Co. to adopt is the following: " We certify that we have specially set aside and *hold* for your account on this the 31st day of December/03 *as security* for the drawing credit which you accord us, the following securities " (R., p. 890).

The letter from New York to Manchester dated 1 Jan., 1904, follows this form, and says: " that we have specially set aside and *hold* for your account " * * * *as security* for the drawing credit which you accord us, the following " (R., p. 891).

Again, the letter of 20th January, 1904, from Manchester to New York says: " We are in receipt of your favor of 1st January in which you give us particulars of the *securities you hold in escrow for us against your drawing credit with us* " (R., p. 892).

In Kessler & Co.'s letter to Manchester of 16th February, 1904, referring to a letter by Flinsch of the 12th February, 1904, " wherein we named *their securities placed in your escrow for a further drawing of* " * * * (R., p. 893).

The Manchester house in acknowledging receipt of the last letter notes " that you have set aside *as escrow to protect the extra drawings* that we have authorized you to make upon us " (R., p. 894).

In Kessler & Co.'s letter of 8th March, 1904, to Manchester, appears the following: " This *collateral* is to go against our drawing of £5,000 of March 1st " (R., p. 895).

On 17th January, 1905, Kessler & Co., Limited, wrote Kessler & Co. stating: " We are in receipt of your private lines of the 4th inst. giving a list of the securities set aside *as cover for your drawings on us* " (R., p. 909).

On September 6, 1904, Manchester wrote noting

"the alteration made in the *securities deposited* against our acceptances" (R., p. 89⁹).

On September 4th, 1904, Manchester wrote to New York as follows: "We have received * * * a "list * * * of the securities now set aside "against your drawing credit on us."

A similar letter was written by Kessler & Co., Limited, to New York on 9th January, 1907.

After the delivery of the securities on October 25, 1907, a formal declaration was made by Henri Kessler in an instrument prepared by the defendant's attorney giving right of access to Nestle and Bertie Kessler to his safe deposit vault in which the language appears as follows: "as collateral to said indebtedness" (pp. 1016-1018). Henri Kessler admits reading both papers before he signed them and that he read the recitals and that the recital stated the facts. The paper dated the 25th was signed at the office of Kessler & Co., and the paper dated October 30th was signed in the same place. It was signed after the securities had been taken from Kessler & Co.'s vaults.

The letter from Manchester, dated December 23, prescribes the form of certificate to be given by Kessler & Co. from time to time; the certificate is to read as follows: "We certify that we have "specially set aside *and hold for your account, &c.*, " * * * " as security.

The letters subsequently written on the first of the subsequent years followed this form:

Letter Jan. 1, 1904,

Letter Jan. 4, 1905,

Letter Jan. 5, 1906,

Letter Jan. 9, 1907.

This intention, as shown by such correspondence, is not muddled by conflicting statements of witnesses as to conversations had when the original arrangement was made. The intention of the parties, that the transaction was to be in the nature of a pledge as distinguished from a mortgage, is sup-

ported by the construction which the parties themselves put upon their agreement, as shown by their acts under the agreement. The salient facts in this connection are that Kessler & Company of New York dealt with the collaterals as their own. They sold them when they could, and they used them as security for their loans when that course seemed necessary, and this was done without consultation with the Manchester house prior to the fact (Master's Report, p. 1009). After the fact it was reported to them as having been done. The proceeds of the sales of the securities were in no way accounted for to the Manchester house by the New York house, but became and were a part of the working capital of the New York house and went into their own account (Master's Rep., p. 1038). The letters themselves, as well as the two formal instruments executed by the Manchester house, after the securities were taken from the possession of the New York house (which instruments are set forth *in extenso* at pp. 1016, 1020 of the Record), indicate that these securities were held as collateral for the indebtedness then existing between the two houses. In the interview between Henry Kessler and Mr. McLaughlin on the 24th of October, the day before these securities were delivered into the possession of the Manchester house, Henry Kessler testified that he said to Mr. McLaughlin that these securities were "pledged" to the Manchester house. At no time has the Manchester house claimed title either as mortgagee or as the general owner of the securities in question. On the 16th July, 1907, Manchester wrote in reply to New York's letter of 8th July, 1907: "We do not know that real estate is just the thing for an escrow of this sort, but we hope you may soon get your price for it and eliminate it from *your assets*." Before a mortgage, either legal or equitable, can exist there must be words sufficiently apt to indicate that the mortgagor intends to part with the title to the mortgagee. There is no intention disclosed to accomplish this fact. On

the contrary, the evidence in the case, as briefly pointed out, positively negatives such a point of view of the transaction.

2. Even if the parties had intended to make a mortgage it would have been invalid

a. in so far as it purported to cover after-acquired property; and

b. in toto because of provisions in it, and in the method of carrying it out, that made it fraudulent in law and absolutely void as to creditors.

In the *Zartman* case the Court of Appeals said, at page 271:

"If a lien was created by the mortgage
 "upon property not in existence at its date,
 "possession after it came into existence, was
 "of no importance. If no lien was created
 "by the mortgage upon such property, the
 "taking of possession pursuant to its terms
 "did not create one as against general cred-
 "itors, who are presumed to have dealt with
 "the mortgagor in reliance upon its absolute
 "ownership of the stock on hand. While
 "the record of the mortgage was notice to
 "all, it was notice of all its terms, which
 "included the right of disposition for the
 "use and benefit of the mortgagor, with no
 "duty to apply the avails upon the mortgage
 "indebtedness." * * *

"As we have seen, equity takes hold of
 "the subject with a strong hand in order to
 "enable the mortgagee to get what the
 "mortgagor intended to give, provided no
 "other interest is involved, but when the
 "creditors of the mortgagor enter the field,
 "equity goes no further than the law, and
 "and will simply enforce a lien if it exists
 "without attempting to perfect it if some-
 "thing is lacking to make it complete. The
 "taking of possession by the mortgagee is
 "relied upon by the appellant to 'ripen the
 "lien,' which, as is conceded, was inchoate
 "before. If the contract between the mort-
 "gagor and the mortgagee fell short of cre-

“ating a lien, as was clearly the case, the act
 “of taking possession did not enlarge, per-
 “fect or complete it. A mortgagee cannot
 “add to his title by his own act.”

It has been pointed out by Judge Ward in delivering his opinion in the Circuit Court of Appeals that if the transaction were a mortgage it would have been good as against the Trustee in Bankruptcy, because under the law of the State of New York, mortgages of choses in action need not be filed. He cited in support of that statement, the Lien Law of New York, Section 90, *Humphreys v. Tatman*, 198 U. S., 91.

Humphreys v. Tatman, cited by Judge Ward, was a case decided by this Court, being thereunto “driven” by the case of *Thompson v. Fairbanks*, 196 U. S., 516. Both of the cases last cited arose in Massachusetts and the laws of Massachusetts are essentially at variance with those of the State of New York upon this subject. In fact, the Court of Appeals of the State of New York has so stated in respect to the case of *Thompson v. Fairbanks*, in its opinion given in the *Zartman case*, 189 N. Y., p. 273, using the following language:

“In reading the authorities it is important to
 “observe how, where and between whom the
 “questions arose, for the remarks of the
 “learned judges in discussing the rights of
 “the mortgagor and the mortgagee are not in
 “point when the question relates to the
 “rights of third persons as against either or
 “both of the parties to the mortgage. Nor
 “are they in point when, as in *Thompson v.*
 “*Fairbanks* (196 U. S., 516, 522), the Federal
 “courts feel bound to follow the decisions of
 “the State courts as to local questions and the
 “law of the State where the case arose differs
 “from that of the State of New York (*Dooley*
 “*v. Pease*, 180 U. S., 126).”

It would seem that Judge Ward in rendering his opinion had overlooked the controlling effect of

the *Zartman* case and of the *Skilton* case which are the final words of the highest court in the State of New York, because in his opinion he makes no reference to them in any way. It appears from the opinion of Judge Ward (p. 1136, top), that he does not consider that the transaction constituted a mortgage either legal or equitable. He puts the ground for the reversal of the judgment (p. 1136, bottom) as being a declaration of trust. This point will be taken up next in order, and we will now follow the line of reasoning given by Judge Noyes, whose opinion will be found at page 1138 of the Record.

Judge Noyes below, on page 1140 of the Record, states as follows:

“It has unusually been said in the cases of
 “endorsed shares of stock and negotiable
 “paper, that whether a transaction should
 “be regarded as a mortgage, or a pledge,
 “must be determined from the agreement
 “between the parties. Accepting this latter
 “view as correct, there is much to support
 “the contention that the parties in this case
 “intended something more than a pledge.
 “They used the word ‘escrow’ which has
 “usually to do with the passing of title.”

We admit that the word “escrow” has usually to do with the passing of title, but it has to do with the passing of title only upon delivery, and prior to the delivery of the escrow the rights of the parties as to title remain exactly as before the escrow was created.

The learned Judge proceeds as follows (p. 1140):

“But I think it unnecessary to determine
 “whether the transaction was a mortgage or
 “a pledge. It is sufficient to say, in view of
 “the decision of the Supreme Court, as well
 “as in view of the facts shown in addition to
 “the endorsements indicating a mortgage,
 “that the Manchester house, *after taking*
 “possession, may safely be regarded as hold-
 “ing *both* by way of mortgage and by way of
 “pledge.”

The Court will notice the words "after taking possession." In other words, the learned Judge relies upon possession to ripen the inchoate lien, which is in exact opposition to the rule of law as laid down by the Court of Appeals in *Skilton v. Coddington* and *Zartman v. The Bank*; because in the latter case it was exactly this which was argued with great force before the Court of Appeals, to wit: that an agreement for a lien is illegal and nugatory because of lack of possession, yet it was inchoate and could be rendered valid and effective, in other words, could ripen into a valid lien by subsequent possession. To this statement the Court of Appeals most emphatically said no. It cannot be a lien; not having ever existed, it could not ripen. On page 1141 of the Record, Judge Noyes proceeds with his opinion as follows:

"Moreover were the fact of taking possession absent in this case it would probably be possible to sustain the claim of the Manchester house to the securities upon broader and more satisfactory lines than could be drawn from the distinction just referred to. The legal difference—before delivery of endorsed and unendorsed securities—except in the case of special endorsement—would seem to be slight. But the equities of the case, coupled with what the parties did—aside from any technicality—make out a strong case in support of an equitable lien in the nature of a mortgage upon the security in favor of the Manchester house valid against the trustee in bankruptcy without a change of possession."

Such is not the law of New York. The Chattel Mortgage Act of New York (Lien Law, Sec. 90), provides that all mortgages of "goods and chattels" shall be absolutely void unless there is an actual and continued change of possession, or the mortgage is filed. Assuming (without conceding) that this act does not apply to mortgages of stocks, bonds and promissory notes, and that filing of such a mortgage

would be ineffectual to dispense with a change of possession, the result is simply that a mortgage of stock, bonds, &c. is to be considered as if the act had never been passed. But such a mortgage would have been void prior to the act, unless possession had changed. The act merely substituted filing for a change of possession in certain specified cases, of which ours is now assumed not to be one; but in no way affected or validated other mortgages. The error in the appellee's argument is in assuming that the act invalidates mortgages which would otherwise have been valid; it did nothing of the kind; it *validated* (by filing) mortgages which would otherwise have been invalid. The cases cited by the appellee do not support its contention.

In *Stackhouse v. Holden*, 66 App. Div., 433, the transfer related to book accounts, which are choses in action as usually understood by that term. But stocks, bonds and promissory notes have by custom acquired a character something more than choses in action, and are capable of manual delivery. In the case of

Risley v. Phenix Bank, 83 N. Y., 318,

the Court (p. 328) made this distinction clear. It said,

“ it is to be observed, that the claim of the
 “ Bank of Georgetown against the Phenix
 “ Bank rested in open account on the books
 “ of the respective banks. *The chose in*
 “ *action assigned was not a note or bond or*
 “ *other written obligation, the retention of*
 “ *which by the alleged assignor would, in*
 “ *most cases, be strong if not conclusive evi-*
 “ *dence that the assignment had not been*
 “ *completed.*”

In the case of the

National Hudson River Bank v. Chas-
kin, 28 App. Div., 311,

the Court said, in answer to the claim that there was not an immediate delivery or change of posses-

sion of the property transferred by written instrument:

" We do not think the statutes referred to
 " are applicable, for the reason that the prop-
 " erty transferred *was not in the possession*
 " *of the Sistare firm at the time the transfer*
 " *was made*, nor was the same goods and
 " chattels within the meaning of the statute.
 " * * * The property was transferred to
 " the Heckshers, could not be delivered. *All*
 " *of it had been, prior to that time, trans-*
 " *ferred to third parties as collateral security*
 " *for the payment of loans made thereon.*"

In a later paragraph on the same page the learned Judge proceeds as follows:

" Now their being no fraud in the trans-
 " action, and no rights of purchasers or attach-
 " ing creditors having intervened, the taking
 " possession of the securities by the Man-
 " chester house before the bankruptcy was,
 " in the absence of a statute making it un-
 " lawful, entirely legal and proper. Regarded
 " simply as a pledge, the pledgee had the
 " right to take possession,"

and cites in support of this *Parshall v. Eggert*, 54 N. Y., 18.

In answer to the first paragraph of the last extract of the opinion of Judge Noyes, the equitable lien which he states would arise, would be an attempt to create a lien upon a shifting stock and upon after-acquired property, and this is exactly what the New York Court of Appeals in the *Zartman* case said could not be done for the reasons (p. 272):

" FIRST: Because a man cannot grant what
 " he does not own, actually or potentially.

" SECOND: Because an agreement permit-
 " ting the mortgagor to sell for his own ben-
 " efit renders the mortgage fraudulent as a
 " matter of law as to the creditors repre-
 " sented by the trustee in bankruptcy."

Zartman v. Bank, 189 N. Y., 272.

The learned Judge was in error in stating that there was no fraud in the transaction here, and that, as no rights of purchasers or attaching creditors intervenes, the taking possession by the Manchester House was entirely legal and proper; such is not the law of New York. *Parshall v. Eggert* was this:

On December 13th, 1866, Roche procured plaintiff to discount his note, maturing January 5th, 1867, and gave plaintiff a paper, in form stating that Roche had received fifty-five tons fine middlings and ten tons bran "as security to my note, given this day for \$1,480." On December 26, 1866, Hunter sold certain mill feed to Roche, but received only part of the purchase price.

Roche disappeared some time between December 26 and January 5. On January 5 plaintiff appeared at Roche's place of business, pointed to "the bran and middlings" and from the clerk in charge demanded possession; the clerk delivered the key, and plaintiff locked up the place, took the keys and departed. Later on the same day, the Sheriff, acting for Hunter, who had started a suit against Roche for the balance of his purchase price, got a locksmith to open Roche's place of business and levied on the stock in the store. Plaintiff brought replevin against the Sheriff, and gave evidence tending to prove "that the bran and middlings in said warehouse January 15, 1867, was the same that was in hand there at the time said receipt was given to the plaintiffs December 13, 1866." A nonsuit was reversed by the Commissioners of Appeals in 54 N. Y., 18, decided in 1873. The Commissioners said (p. 23):

"It may be considered as showing conclusively *against Roche* that the property was delivered by him to the plaintiffs and re-delivered by them to him to be held for them according to the terms of the receipt."

The Commissioners then proceeded to say that anyhow (p. 24):

“ In the absence of any intermediate right
 “ *the parties* could perfect a written contract
 “ of pledge by subsequent delivery. * * *
 “ A creditor who acquires a specific right
 “ to or lien on the thing pledged may
 “ prevent the pledgee’s interest in an un-
 “ delivered chattel from attaching. But such
 “ is not the condition of the creditor at large.
 “ The only ground on which he can claim to
 “ prevent the perfecting of such a right in the
 “ pledgee is that it works a fraud on him.
 “ The transaction is not one which any statute
 “ calls fraudulent in itself, and its validity
 “ ought, therefore, to go to the jury. Of that
 “ right at least the plaintiffs were deprived
 “ by the ruling of the Judge. * * * un-
 “ less we are prepared to hold that the plain-
 “ tiffs, *as between themselves and Roche*, were
 “ not entitled, on either of the grounds above
 “ discussed, to take possession.”

It is quite apparent that *Parshall v. Eggert* is no authority whatever for the appellee, and that it does not support what the judges below cite it for. In *Parshall v. Eggert*, there was no bankruptcy or insolvency; possession was taken before any creditor touched the mill feed; the New York law does not forbid a preference; the transactions were *inter partes*, and the Court expressly limited its decision to such a state of facts.

In *Skilton v. Coddington*, 185 N. Y., at page 86, the Court expressly said:

“ A creditor by simple contract is within
 “ the protection of the statute as much as a
 “ creditor by judgment, but until he has a
 “ judgment and the lien, or a right to a lien
 “ upon the specific property, he is not in a
 “ condition to assert his rights by action as
 “ a creditor. * * *
 “ It is true there is to be found in some cases
 “ a statement that the mortgage is void only
 “ as to judgment creditors. That statement

“if construed in the light of the circumstances of the case before the Court and with reference to the context of the opinion, is substantially correct, though not strictly accurate as a general proposition.” * * *

“Where the recovery of a judgment becomes impracticable it is not an indispensable requisite to enforcing the rights of the creditor. So it was held that an assignee in bankruptcy, could, for the benefit of creditors, attack a fraudulent mortgage, though if a creditor had sought that relief in his own name it would be necessary that his claim be first put in judgment.”

Judge Noyes, further proceeding in his argument on the question as to the time that the transfer took place, proceeds as follows (p. 1142):

“The possession having been actually taken within four months of the bankruptcy, we now reach the decisive question whether it can be held to relate back to the time when the right to take possession was created, whether the act of taking possession created a lien or merely enlarged and perfected an existing lien. And, in my opinion, in view of the equities between the parties and all the circumstances, such act should relate back to the creation of the right which it perfected, and the *transfer* be regarded as having taken place more than four months before the bankruptcy.”

In support of this proposition the learned Judge cites the case of *Thompson v. Fairbanks*, 196 U. S., 516, which, as pointed out above, does not declare the law of the State of New York. Furthermore, this Court held in the case of *Humphreys v. Tatman*, 198 U. S., 91, that the question whether a transfer did or did not take place at any given date depends entirely upon the local law, and therefore *Thompson v. Fairbanks*, cited by Judge Noyes, is no authority whatever as to whether

a transfer took place in New York State at any given date.

Similarly the case of *Sabin v. Camp*, 98 Fed., 97, is no authority as a declaration of the laws of the State of New York, as it is apparent that that case was decided upon the laws of the State of Vermont. In attempting to distinguish the New York case of *Zartman v. First National Bank* Judge Noyes says:

“ This is not in point because there there
 “ was merely a contract to give a mortgage
 “ upon after-acquired property. There was no
 “ lien which could have been enlarged or per-
 “ fected by taking possession.”

The characterization of Judge Noyes of the mortgage in that case as merely a contract assimilates that instrument exactly with the instrument in this case because the most that the letters between Manchester and New York can amount to is a *contract*. The New York cases hold that where a mortgage purporting to cover property not owned by the mortgagor is made, the document is in substance and effect merely a *contract to give* a mortgage thereon in future when the property is acquired. This means that the mortgage is a contract, and thus assimilates it exactly to the document in suit; —at least to that construction of the documents most favorable to the appellee.

b. The fraudulent nature of the so-called mortgage, by reason of the permission to the bankrupts to sell all or any part of the securities, keep the proceeds, and substitute (if any substitution at all were made) only what they wished, we consider under Point IV.

ANSWERING THE THEORY OF A DECLARATION OF TRUST.

This theory was not seriously advanced by the appellee either before the District Court or before

the Circuit Court of Appeals; but as it is the basis for the minority opinion, that of Judge Ward, in the Circuit Court of Appeals, we consider it. Briefly Judge Ward's reasoning was this:

The transaction was a perfectly honest one, and some construction should be found to favor the Manchester concern if possible; the correspondence used neither the word mortgage nor pledge, nor trust, but the word "escrow," which was used improperly; the use of the word "collateral" in the correspondence and documents does not necessarily indicate a pledge, but only ownership of or interest therein for the purpose of protection; on account of the family connection and the business dealing and the mutual confidence this arrangement was natural. Therefore, the Court said, there was a declaration of trust. The conclusion of the learned Judge does not seem to be warranted by his premises, and as to his premise of honesty, we show in the next Point that the transaction was utterly lacking in good faith toward creditors and prospective creditors, other than the Manchester house. A declaration of trust requires a transfer of title, and certainly there was no transfer of title here, nor was there any accounting by the New York house of the proceeds of the so-called trust *res*. These two facts of themselves we submit make impossible any serious consideration of the trust theory. The majority of the Circuit Court of Appeals took our view and said of the declaration of trust theory (p. 1138):

"I cannot accept this conclusion. It is
 "an essential element in a declaration of
 "trust that title pass from a declarant of trust
 "as an individual to himself as trustee. It
 "must be shown that he intends to divest
 "himself of the beneficial interest in the prop-
 "erty and hold it thereafter as trustee for
 "the benefit of another. *Now, it is clear*
 "*from the evidence that this is just what the*
 "*New York house did not intend to do. They*

“intended to set aside the obligations only as security for their indebtedness to the Manchester house. In case this indebtedness were paid, the latter were to have no interest in the security.”

Whether there was a declaration of trust, and a consequent transfer of the title, is just as much a question of local law as the other questions, namely, those of pledge and equitable mortgage. On this subject the law of New York is as follows:

The leading case is *Martin v. Funk*, 75 N. Y., 137. The law as announced in this case has been modified by the latest decisions of the New York Court of Appeals, especially in the *Matter of Totten*, 179 N. Y., 112.

In *Martin v. Funk*, it was held that where A deposited money in a savings bank to his own credit in trust for B and the account was so entered in the savings bank book delivered to A, this amounted to a declaration of trust in favor of B, although A retained the book in his possession. This case has, however, been explained in later cases.

In *Young v. Young*, 80 N. Y., 422, the Court in distinguishing *Martin v. Funk* said (p. 440) that in that case:

“The donor delivered the money to the bank, taking back its obligation to herself
“in the character of trustee for the donee,
“thus parting with all beneficial interest in
“the fund, and having the legal title vested
“in her in the character of trustee only.”

In *Barry v. Lambert*, 98 N. Y., 300, the Court said (p. 306):

“It is well settled that a trust in personal
“property may be created by parol, and that
“no particular form of words is necessary for
“its creation, but the words or acts relied on
“to effect that object should be unequivocal,
“and plainly imply that the party making
“them intended to divest himself of his inter-

*"est in the property, and to hold it thereafter
for the use and benefit of another."*

Citing, *Martin v. Funk*, *Young v. Young*, and other cases.

In *Matter of Bolin*, 136 N. Y., 177, where the bank book was entitled "Julia Cody, or daughter, Bridget Bolin," and the book was left in the custody of the daughter, the Court held there was no valid gift, and said (p. 180):

*"The evidence must show that the donor
intended to divest herself of the possession
of her property and it should be inconsistent
with any other intention or purpose."*

In *Locke vs. Farmers L. & T. Co.*, 140 N. Y., 135, the Court construed an instrument relating to certain shares of stock and sustained it as a valid declaration of trust, although the settlor retained possession of the stock. The Court, after citing *Martin v. Funk*, and reciting the facts, said (p. 141):

*"No beneficial interest in the property was
left in himself (the settlor), but the whole of
that interest was by his own act vested
elsewhere. He held the legal title to the
stock, but necessarily held it, from the date
of the declaration, as trustee for the bene-
ficiaries."*

These cases establish that to constitute a declaration of trust where the property remains in the possession of the declarant or settlor, the latter must intend to divest himself of all beneficial interest in the property and to hold it thereafter as trustee for the benefit of another.

Unless, therefore, Kessler & Co. of New York by their letters, certificates and acts intended to divest themselves of all beneficial interest in the securities and to hold the whole interest therein for the benefit of Kessler & Co. of Manchester, the transaction cannot be sustained as a declaration of trust.

It is plain from the very words of the letters that Kessler & Co. of New York were to hold the securi-

ties only as *security* for their own indebtedness to Kessler & Co. of Manchester on long drawings. If this indebtedness were paid, Kessler & Co. of Manchester were to have no interest in the securities. It is evident that all that was intended was that Kessler & Co. of Manchester were to have a lien on these securities as security for their claim against Kessler & Co. of New York. This may constitute a pledge, but not a declaration of trust. *A man cannot be a technical trustee of his own personal property merely as security for his own debt.* The very fact that the property is to be held by the trustee merely as security for his own debt shows that the trustee has not divested and did not intend to divest himself of all beneficial interest in the property, because upon the payment of the debt the property would revert to him. The beneficial ownership remains in him subject only to the special property or lien created in favor of the creditor. Further, the acts of the parties show no relation of trustee and *cestui que trust*. The securities were sold by the New York house as and when they pleased, without accounting therefor in any way. This they were authorized to do by the agreement and this they did.

If a pledge, imperfect or invalid because of want of delivery of the pledged property, can be sustained as a declaration of trust, the result will practically be to abolish technical pledges "whose very essence" is the possession of the pledged property by the pledgee (*Casey v. Cavaroc*). A cognate question was considered in *Young v. Young*, 80 N. Y., 422, where a gift, invalid because of want of delivery, was sought to be sustained as a declaration of trust. The Court said, page 437:

"It is established as unquestionable law
 "that a court of equity cannot by its author-
 "ity render that gift perfect which the
 "donor has left imperfect, and cannot convert
 "an imperfect gift into a declaration of trust,
 "merely on account of that imperfection."

If that could be done, then, the Court said (p. 439): "There never could be a case "where an intended gift, defective for want "of delivery, could not, if expressed in "writing, be sustained as a declaration of "trust."

So in the case of a pledge, imperfect for want of delivery of the pledged property, the Court cannot convert such a pledge into a declaration of trust merely on account of that imperfection. If a writing purporting to create a pledge could be sustained as a declaration of trust, although ineffectual as a pledge for want of delivery of the pledged property, then there never could be a case where an intended pledge, defective for want of delivery, could not, if expressed in writing, be sustained as a declaration of trust.

The essential feature of a pledge is delivery of the pledged property to the pledgee. If an intended pledge, unaccompanied by such delivery, can be sustained as a declaration of trust, then no one would have recourse to a pledge, and all transactions intended to take effect as a pledge would take the form of a declaration of trust with the property remaining in the custody of the declarant of the trust, and formal pledges accompanied by delivery of the property to the pledgee would practically cease to exist.

This would open the door to fraud and deception. The rule requiring possession by the pledgee was adopted to prevent fraud and deception. As was said in *Casey v. Cavaroe* (*supra*):

"The requirement of possession is an inextinguishable rule of law adopted to prevent fraud and deception; for if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

The appellee claims that a trust was declared: What was the trust? Was it to hold the securities,

and deliver them to Manchester? If so, when was the delivery to occur—on demand, or when New York had failed to take care of its drafts?

Was it a trust to sell the securities, and apply so much of the proceeds as might be necessary to cover drafts not taken care of by New York? If so, the sale was surely not to take place until after the drafts had matured and not been taken care of. There is not a line of evidence which tends to show that Manchester conferred upon the New York house the right to sell for *Manchester's* benefit; and the acts of the parties on October 25th and 30th, 1907, absolutely disprove any such intent.

So that the only possible trust was to hold the securities and to deliver possession thereof at some future time—a trust not only indefinite but absolutely unknown to the law of New York. The result of all which was to create a trust in the New York house to deliver the securities at the psychological moment so that Manchester should be a preferred creditor.

THE SUBJECT OF EQUITABLE LIENS IN GENERAL.

It is impossible to catalogue, or to delimit in any fixed way, the circumstances, or infinite combinations of circumstances, that may lead equity to grant or refuse relief in any given case; the books are full of cases where courts have said that owing to the very peculiar circumstances of that case relief is refused or granted, and that the case must not be considered a precedent except upon the exact facts. In such a case no human being, however learned in the law, can possibly know what the Court will do until it has done it; *especially as equitable relief is largely a matter of discretion*, and no chancellor's discretion will or can be like any others in every respect. Frequently, too, discretion exercised in one way below, will not be disturbed on appeal even though the higher court would have exercised it differently had they been sitting below.

To call the result of such discretionary relief "equitable liens" is not exact.

Such indefinite and elusive things, are not the "liens" that survive bankruptcy.

The cases where equity has given relief in insolvency cases, are generally where the claimant's money *has produced the very thing sought to be subjected to the lien*, *e. g.*

National Bank v. Rogers, 166 N. Y., 380; *Hauselt v. Harrison*, 105 U. S., 401 (both cited below by our adversaries), or where this Court, without considering at all what a State court would have done, sustains a claim for especially peculiar circumstances, *e. g.*

Hurley v. Alcheson, &c., R. R., 213 U. S., 126, in which an additional circumstance (not referred to by the Court) was that equitable and beneficial title to the coal was intended to be passed to the railroad.

Here the appellee has produced nothing; its acceptances in no wise produced the proceeds of the drafts because, obviously, a buyer of unaccepted exchange buys it *from the drawer*, and for his confidence in the drawer, and except for that confidence doesn't know that it will ever be accepted at all.

Our point here is that if equitable principles may be applied it is the duty of *this* Court to define what principles are inherent in each case to overcome the apparent clear intent of the Bankruptcy Act. We insist that the equities here are with us entirely, and that Manchester's acts were not in good faith toward the numerous creditors represented by the trustee. We discuss this in the next point.

POINT III.

The transaction between Kessler & Co. of New York and Kessler & Co. of Manchester was inequitable and in bad faith and deceived existing as well as prospective creditors.

Heretofore we have not considered the good or bad faith of the parties; but only the inexorable rule of law which requires possession in the case of pledge, and, in the case of mortgage or declaration of trust, a transfer of the title and beneficial interest. In other words, we think the law is in favor of the appellant without respect to the appellee's good or bad faith. But if the contrary were the law, we say the same result would follow for the reasons stated at the head of this point.

There must be a reason for an inexorable rule of law. This reason has been pointed out in the leading case on the subject, *Casey v. Cavaroc*, where the Court stated that so long as the pledgor is permitted to *retain possession of his property, creditors have a right to assume that he is the owner of the property which he possesses; and creditors are presumed to deal with him and accord him credit by reason of that fact.* This is for the protection of creditors and the business interests of the country generally "and is a rule of "general policy, which declares possession to be the "evidence of property, and the presumption is that "every man is trusted according to the property in "his possession."

Martin v. Mathiot, 14 Serg. & R., 214.
Porter Co. v. Boyd, 171 Fed., 305.

In the *Zartman* case, *supra*, the Court said (p. 271):

"Creditors are presumed to have dealt with
 "the mortgagor in reliance upon its absolute
 "ownership of the stock on hand."

Also in *Robinson v. Elliott*, 22 Wall., 525, it was said "men get credit for what they own and possess." The New York house held themselves out to all the world as the owners of the securities, as the arrangement expressly authorized the bankrupts to represent themselves as the owners thereof, while the very securities were subject to a secret lien which was to be later urged to defeat a recovery by said creditor. In their efforts to sell, the New York house had to go among bankers and investors, and these efforts were not confined to the City and State of New York, but extended to England, France, Germany and Switzerland, of which countries certain of the creditors of the New York house are citizens. What would be the natural consequence of such efforts, made by a banking house of the apparent standing of Kessler & Company of New York, among bankers throughout the world, for the sale of these securities? As there were bankers, they held themselves out as acting on their own behalf, which was true. The result was a credit with various bankers and customers, fictitious in fact and fraudulent in law. Judge Ward stated in his opinion (p. 1137) that—

"There was no secrecy as to the securities
 "under consideration which was not inherent
 "in their nature. The public does not know
 "what stocks, bonds or notes a merchant
 "has and therefore does not give him credit
 "because of them."

Here Judge Ward failed to discriminate; doubtless a plumber does not get credit for the Chinese tapestries he may own, nor a baker for his collection of Egyptian manuscripts; but the plumber and the baker do get credit for their respective stocks in trade. Now, a plumber's stock in trade is plumbing fixtures, and a baker's cereal food products. By the same token a banker's stock in trade is stocks, bonds and securities, and he doesn't have to put them in a show window to acquaint

people with his substance. Kessler & Company of New York were not merchants; they were bankers whose stock in trade were bonds and stocks, purchased in the expectation of selling them again at a higher price. Ownership of their stocks and bonds was, by their efforts and negotiations for sale and loans, made to appear just as publicly as a merchant's efforts to secure the sale of his flour, oil or wheat is a public ostentation of his ownership.

With the consent of the Manchester house, and frequently at their urging, Kessler & Company of New York went throughout the financial world holding themselves out as the owners of these various securities and seeking credit by reason thereof. Both the opinions rendered in the Circuit Court of Appeals characterized the acts of the two parties as acts in good faith. Good faith to whom? Was it good faith to the creditors? Was it good faith to the correspondents of the house of Kessler, bankers, in England, France, Germany and Switzerland to hold themselves out as owners of the securities, knowing that when they did so there was a secret lien which they intended to enforce in the event that the bankrupts should be unable to meet their engagements? Was it good faith to enter into an arrangement which permitted the New York house to strip itself and yet keep the security of the Manchester house intact, for there was no limit to the securities they could give to the Manchester house. And when at last they became aware that the final reckoning could no longer be postponed, there was nothing to prevent their putting into the escrow all the gilt-edged assets which they had, and removing (or not) from the escrow all securities of doubtful value. In fact, they did just that, for on October 25th, *they took out of the "escrow" Daimler common and substituted Daimler preferred therefor.*

Judge Ward has stated (p. 1137) in his opinion:

"There is no evidence that any exhibition
 "of or statement as to these securities was
 "made to any one by the New York house

“for the purpose of obtaining credit. Their books, if examined, would have shown what the real dealing between them and the Manchester house was.”

The case is full of evidence that the bankrupts held themselves out to various people as the owners of these securities, and sought credit thereon, and endeavored with all their power to sell the securities which are contained in these escrows. It appears from the record (p. 689) that credit was sought of Schunck, and that Schunck accepted Orleans County bonds, Muskogee Gas & Electric securities, and that he had been offered Cripple Creek securities and Maclay and Milne, Turnbull Co. notes. It also appears that a drawing credit was asked of the same person upon Daimler preferred stock, which it appears he preferred to the Cripple Creek. The escrows contained the securities named. Special efforts were made by the bankrupts, especially in England and on the continent, to dispose of their holdings in Cripple Creek. On page 735 of the record it is shown that efforts were made to sell the Daimler stock, and that P. W. Kessler was aware of that fact. Efforts to borrow money upon their ownership of the Breweries securities and the Orleans County Quarry Company bonds, from the German Bank, appears on page 736 of the record. It also appears on pages 739 and 743 of the record that a loan was arranged with A. Ruffer (a banker of London) to loan £11,500 with Orleans County Quarry bonds and notes as collateral. It also appears that the Cripple Creek stocks were offered for sale and as security for loans on drawing credits (pp. 743 and 744). It is also shown on the last page, in a letter to P. W. Kessler, why the Cripple Creek Central had not been sold up to that time. It appears again, on page 756 of the record, why the Brewery bonds had not been sold. This explanation was given by the New York house in answer to an

inquiry made by the Manchester house as to why these bonds had not been sold. On page 758 there is further evidence as to efforts to be made to secure credit from the Anglo-Foreign Bank on the Muskogee Gas & Electric securities and the Orleans County Quarry Company securities. On page 760 is shown further efforts to sell the Daimler stock. On page 776 it appears that the Muskogee Gas & Electric Company's bonds were offered to a Glasgow firm for sale. It appears by this letter that the entire remaining bonds belonging to the bankrupts were offered for sale. As above stated, these bonds were in the escrow (see Exhibit 11, between pages 878 and 887 of the Record). On page 779 it appears that the New York house was drawing on the Basler Handels Bank with \$15,000 of Maclay notes and \$15,000 of Orleans County Quarry notes. On page 782 of the record it appears that consent was given by the Merchants' Bank to discount \$45,000 of Orleans County Quarry notes. On page 783 appears a letter written to the Manchester house in which it is stated that the United Breweries bonds are unsalable. This evidently was in response to a further inquiry as to why these securities had not been realized on. On page 786 of the record it appears that the New York house wrote the Manchester house asking them to sell Muskogee Gas & Electric securities, being some of the securities contained in their own escrow. On page 884 of the record again appears the knowledge of the Manchester house and the efforts being made to sell Cripple Creek Central stock and Daimler stock, and the approval of that house to such efforts. Again, inquiry is made by the Manchester house (p. 846 of the record) as to the salability of the Brewery bonds and efforts to obtain a loan with Daimler.

This case is not one of fraud based upon express misrepresentation, and it is not necessary for the trustee in bankruptcy to show that the defendants made express representations false in fact. But the case is full of evidence to show that with the knowl-

edge and consent of the Manchester house the New York house represented itself as the owner of the securities over which the Manchester house claimed a secret lien. It is impossible to say what causes induce the giving of credit. Credit is intangible; it is an atmosphere and arises because of the general reputation and standing of a person in the community. As was said in *Martin vs. Mathiot*, 14 Serg. & R., 214, "It rarely occurs that a man prove what it was that induced him to give credit." As the owner of stocks and bonds he collects coupons and dividends, meets the officers of the various companies which have issued the securities, borrows money from various banks as the owner of the securities, negotiates with various people for the sale thereof; so it becomes a matter of common knowledge throughout the financial world that such a person is the owner of the securities of which he is in possession.

Further, an examination of the pages of the memorandum book on which were entered the sales and hypothecation of the securities (pp. 879-885) will show how frequent and numerous these transactions were. The letters passing between the parties show every change of the securities and what was said thereupon by Manchester (pp. 889-939).

Every time the New York house negotiated for a sale of these securities or any part thereof they represented themselves as the owners of the property.

While, therefore, the New York house was representing itself as the owners of the securities now claimed by Manchester by virtue of the secret lien the Manchester house knew the failing financial condition of the New York house; they knew that the capital of the New York house was locked up in securities which could not be sold except at a loss, and that the securities were not listed on the New York Stock Exchange; they knew that a financial storm was passing over the country with New York as its centre; they knew that the panic of 1893 and 1903 were nothing compared to that

then raging; they knew that the managing partner in New York was so disturbed that he took "drops" to induce sleep; they knew that the other partner was abroad seeking renewals and extensions of credit which he could not get; they knew that the values of securities were depreciating daily on the Stock Exchange and that there was no market for unlisted securities and that the foreign and domestic bankers were withdrawing credits and calling loans; they knew that a verdict for a large amount, \$140,000, had been taken against the New York house which was affecting their credit; they knew that when loans were called the New York house begged for time in order to get money elsewhere; they knew that the general business of the New York house was bad and that many of its customers had ceased buying exchange; they knew that the Cripple Creek Central Railway had a deposit of over \$100,000. with the New York house and that (Blackmer) the President of the Railroad, was dealing with the New York house as the owner of securities some of which were pledged secretly to them (Manchester).

What would have been the effect upon such depositor or any other depositor or creditor in those days when banks and trust companies were failing or with difficulty sustaining runs, if they had been told that \$600,000 of securities apparently owned by the New York house were not their property, but were the property of the Manchester house.

Yet the depositors and creditors generally were giving credit to the New York house day to day upon the strength of their ownership of these securities; they knew that during all the time the New York house was selling long drafts (borrowing money) and was asking credit right and left as the owner of the property covered by the escrow:

Knowing all this, they stood by and let creditors deal with the bankrupts as the owners of the securities until failure came.

Then they announce to the world that a large

part of the capital of the bankrupts was theirs by virtue of a secret lien, and seek to enforce the same. We say that they are ESTOPPED.

We believe that the real facts show anything but good faith on the part of the Manchester house, and that the agreement and acts under it were unconscientious and in bad faith.

POINT IV.

The agreement between the parties was fraudulent as a matter of law irrespective of good or bad faith, and was void as against creditors.

This is so, whether the agreement be considered as one for a pledge, or for a mortgage, or as a declaration of trust, or in any other aspect. It was absolutely void, because both in terms and by the construction of the parties it allowed the bankrupts to sell the securities supposedly affected by the equitable lien, free and clear from the lien, without accounting for the proceeds, without applying them in satisfaction of the debt, and without substituting therefor any other securities except such as the bankrupts' discretion might dictate, without even supervision as to character, amount or value.

Very likely one or two expressions may be found in Manchester's letters intimating that the substituted securities ought to be of the same or greater value, but Manchester did not have nor claim the right, nor did it in any instance exercise the right to consider the substituted securities or veto them; in several instances a mild sarcasm was indulged in over the quality of the substituted securities, but this was all (p. 904, fol. 2691; p. 906, fol. 2695; p. 920, fol. 2737; p. 926, fol. 2755; p. 932, fol. 2875;

p. 935, fol. 2784). *But the convincing fact about this matter of substitution is that time after time the bankrupts withdrew securities and did not substitute anything for them at all; and this was just what they did in every case where they could spell out any increase in the market value of the securities already in the escrow.*

Thus the bankrupts on August 26th, 1904, took out \$25,073.81 of securities from the escrow and replaced only \$13,980 worth because certain other securities, viz.: Chicago & Great Western had, as stated, increased in value by about \$13,000; this was approved by Manchester (fols. 2673-2676); again, on March 6th, 1905, over \$25,000 was removed and only \$12,500 of new securities added, the difference being made up by the alleged increase in the value of certain Reductions stock already in the escrow; this was approved by Manchester (fols. 2708-2711); again, on April 13th, 1905, \$39,700 of securities were removed and nothing was replaced owing to the alleged enhanced value of U. S. Reduction and Refining stocks, which Manchester approved (fols. 2713-2715); again, on May 15th, 1905, \$31,400 of securities were withdrawn and only \$18,000 replaced because "in spite of these prices you have \$537,000 collateral whereas our drawings are only \$480,000" (fols. 2717-2718).

The exhibits 6, 7, 8, 9, 10, 11 and 12 (pp. 878-885) are transcripts from the page of the loan book referring to the escrow. The testimony was that each time Manchester securities were removed, the securities so removed were scratched out with a pen and the substituted security (when one was substituted) was interlined. The merest examination of these exhibits and of the letters (pp. 892-938), which refer to the withdrawals, will show that withdrawals were being made almost constantly, and that Manchester expected the bankrupts to have constant occasion to "vary the deposit" (fol. 2653). All this means that the Manchester house was not in reality relying on the

escrow itself but on the confidential relations existing between the houses, multiplied by their close family ties and the common ownership of stock in both companies by Alfred Kessler, the bankrupts' head firm member.

The New York authorities are numerous and decisive that clauses permitting the debtor to use the securities as his own make the agreement fraudulent in law and void *ab initio* as to creditors; and that if the debtor and creditor act in such a way that the debtor uses the property as his own, the result is the same:

Zartman v. 1st Natl. Bank, 189 N. Y., 267, 273, supra, and cases cited below.

In the Zartman case there was a duly recorded mortgage of real and personal property; a clause therein purported to cover after acquired personal property. Personal property consisting of shifting stock and material on hand was after acquired, and the mortgagee took possession of it three days before bankruptcy proceedings against the mortgagor. The mortgage provided that "until default shall be made in the payment of the interest or principal of the said bonds or some of them * * * it shall be lawful for the said party of the first part * * * to have, hold, use, possess and enjoy the said premises and property with the appurtenances, and to receive the income and profits thereof to its own use and benefit without hindrance or interruption." The mortgagee contended that while the mortgage did not create an absolute lien upon the after acquired stock and materials, it did operate as an executory contract to deliver possession and to place the property, as rapidly as it was acquired, under the lien of the mortgage, and that, although such property was subject to seizure by creditors up to the time when the mortgagee took possession pursuant to the mortgage, yet the act of taking possession ripened the lien and made it absolute as

against general creditors or those with no prior lien. The highest court of New York held that the clause gave the mortgagor power to sell for its own benefit all materials and products until the trustee took possession; and that such clause rendered the instrument, in so far as it applied to such property, fraudulent as a matter of law as to the creditors represented by the trustee (citing at page 273, many of the cases noted below).

Skilton v. Coddington, 185 N. Y., 80, was an equity action to enforce an alleged chattel mortgage made on October 4th, 1897, by W. J. B. to plaintiff covering stock and fixtures in W. J. B.'s store and stock thereafter to be upon the said premises. (Under the New York law this chattel mortgage, in so far as it purports to cover after-acquired property, was merely an agreement to mortgage such articles when they come upon said premises.) The instrument provided that W. J. B.

"may sell and dispose of said property and
 "apply the proceeds of such sale to the pay-
 "ment of the debt" and W. J. B. cove-
 nanted "that as said stock is sold * * *
 "he * * * will apply the proceeds to the
 "payment of such debt, excepting such por-
 "tion thereof as is necessary for the expenses
 "of the business or as he or they may need it
 "to replenish or increase the said stock of
 "goods, wares and merchandise, it being
 "understood and agreed that in such case the
 "substituted stock shall take the place and
 "be in stead of the stock so sold, and it being
 "also understood and agreed that no part of
 "said stock or of the proceeds shall be used
 "or disposed of * * * except as herein-
 "before set forth." W. J. B. further cove-
 nanted that he would keep the said stock
 "replenished, renewed and of a value at
 "least equal to its then value." This chattel
 mortgage was made October 4th, 1897, was
 not filed until October 2, 1902, and on No-
 vember 7, 1902, plaintiff demanded posses-
 sion which was refused. On November
 25th, 1902, W. J. B. became bankrupt.

The bankruptcy court directed the trustee to reserve certain proceeds to meet any liens or claims that might be on the property, and thereupon plaintiff brought this action and prevailed until he got to the Court of Appeals where the agreement, or chattel mortgage, was held void.

On the fraudulent nature of the instrument, the Court of Appeals said this: *notwithstanding the express finding of fact of the Courts below that the mortgage was made in good faith*, it was fraudulent as a matter of law and void as against all creditors. The Court disapproved the provision permitting the mortgagor to sell the stock even though the proceeds should be invested in new stock which should pass under the mortgage. The Court said (p. 91):

"The substituted property might or might not equal in value the property realized from the lien of the mortgage by sale. Even in the most favorable view it would give the mortgagor unlimited power of speculation in the disposition of the mortgaged property. The property might be wasted by ill-judged speculation, even though the mortgagor acted in good faith,"

but, said the Court, the agreement was fraudulent and void because (p. 91),

"it does not require all the proceeds of the mortgaged chattels to be applied either on the mortgage debt or to the acquisition of new property, but only the surplus after deducting the expenses of carrying on the business * * * (Of such a provision * * * it is idle to argue that if the mortgagor acted honestly and lived up to his agreement the property newly acquired would be the equivalent of that disposed of by sale. On the contrary, it is not only possible, but, if the business proved unsuccessful, probable that a large part of the mortgaged property would be sold without the proceeds being applied either to the reduction of the debt or to new property substituted for that disposed of. The purpose

“and intent of the agreement between the
 “parties is plain on its face. The mortgagor
 “was to conduct the business for the term of
 “five years in the same manner as if he was
 “the absolute owner of the stock in trade,
 “selling and buying stock at his pleasure and
 “discretion and paying the expenses of the
 “business out of the sales, while if at any
 “time he should be unsuccessful and be
 “pressed by his creditors, the whole stock
 “was to be subject to the lien of the mort-
 “gage as against the creditors from whom
 “the very goods might have been purchased.
 “No case in this State has gone to the extent
 “of upholding such an agreement, and in our
 “opinion it is fraudulent and void as a matter
 “of law.”

In *Bowdish v. Page*, 153 N. Y., 104, a paper or contract was made by which a lien was sought to be created on certain chattels. The mortgagee took possession of the goods on July 23rd, and thereafter, on a judgment obtained on April 30th by a creditor against the mortgagor on which execution was issued on July 29th, the Sheriff levied on the goods on August 1st; thereupon the mortgagee sued the Sheriff and the creditor. The Referee held, on sufficient evidence, that the mortgage had become void, not because of any provision of the Statute, but because of the conduct of the mortgagor and mortgagee in respect to the property. The Court of Appeals held, that as possession was not given pursuant to the mortgage, which was void, but upon an independent transfer, the plaintiff could recover, because while this independent transfer created a preference, preferences are not against the law of New York. Needless to say, the opposite result would have been reached in the *Bowdish* case, if the plaintiff there had not obtained the possession on July 23rd.

In *Scherl v. Flam*, 129 App. Div., 561, the plaintiff, a wholesale flour merchant, made an agreement with Z, a baker, by which Z agreed to buy all his flour from the plaintiff, and plaintiff agreed to sup-

ply it as needed; but that the title thereto should remain in the plaintiff until paid, and that as Z should "desire" it, he should notify the plaintiff, "and shall then immediately, at his earliest convenience, pay the plaintiff for such flour by him intended to be used, and upon such payment the title" should pass to Z. This contract was filed, and hence its invalidity was not by command of the statute; moreover, the New York Lien Law (Section 112) made such sales, unless filed, void only as against subsequent purchasers, pledgees or mortgagees in good faith. Some of Z's judgment creditors levied on flour delivered by the plaintiff to Z, and plaintiff seeks to recover it. The Court held the agreement to be void and fraudulent on its face, and the defendant prevailed.

In *Hangen & Hangen v. Hachemeister*, 114 N. Y., 566, a chattel mortgage covering the fixtures and supplies of a saloon was held fraudulent and void because it was made pursuant to an agreement that the mortgagor should continue in the possession of the property and of the full and free enjoyment of it with the right to sell and dispose of the liquors, cigars, etc., without applying the proceeds upon the mortgage debt.

In *Southard v. Benner*, 72 N. Y., 424, it was held that if at the time a chattel mortgage covering merchandise stock is executed it is understood and agreed that the mortgagor may sell the stock and use the proceeds in his business, and the agreement is carried out, the transaction is fraudulent in law as against the creditors of the mortgagor; and that such an agreement may be proved by parol and may be inferred from the fact that the mortgagee had permitted the sales to be made.

In *Potts v. Hart*, 99 N. Y., 168, such a mortgage was held void, although there was only a tacit understanding that such sales might be made.

In *Russell v. Winne*, 37 N. Y., 591, such a mortgage was held fraudulent and void whether the agreement was contained in the mortgage itself or was independent of it.

In *Mandeville v. Avery*, 124 N. Y., 376, a chattel mortgage was held fraudulent and void which was executed under an agreement that the mortgagor might remain in possession and sell the property and use the avails in substantially the same manner as before the execution of the mortgage.

The authorities in support of the proposition might be multiplied indefinitely; other cases are:

Wood v. Lowry, 17 Wend., 492.

Chatham Bank v. O'Brien, 6 Hun, 231.

Griswold v. Sheldon, 4 N. Y., 584.

Gardner v. McEwen, 19 N. Y., 123.

Brackett v. Harvey, 91 N. Y., 214.

Bainbridge v. Richmond, 47 Hun, 391.

And when an agreement for security or protection is thus fraudulent in law and void, it may be attacked by any creditor, whether having a judgment or not, if it is impracticable or useless to obtain a judgment.

Skilton v. Coddington, 185 N. Y., 80, 86-89.

Russell v. St. Mart, 180 N. Y., 355, 359-360.

Karst v. Gane, 136 N. Y., 316, 323.

Stephens v. Perrine, 143 N. Y., 476.

In some of the cases cited the invalidity of the instrument resulted from the statute requiring registration; in other cases from the manner of dealing with the property; in some cases from both causes. But the Court of Appeals made no distinction depending on the cause of such invalidity, and, moreover, expressly said that there could be no difference in the result whether the vice resulted from fraudulent clauses and fraudulent dealing with the property or from lack of registration.

Bowdish v. Page, 153 N. Y., 104, 109.

The law of New York on this subject, as above stated, is precisely the law of this Court:

Knapp v. Milwaukee Trust Company, 216 U. S., 545.

In the Knapp case the holder of an alleged chattel mortgage covering telephone apparatus inter-

vened in the bankruptcy proceedings. The mortgage permitted the mortgagor "to remain in possession of the property, applying the proceeds thereof to his own use, except that no dividend shall be declared or paid without first making provision for the sinking fund and interest on the bond, and permitting the mortgage trustee to waive payment into the sinking fund for any quarter year, in which case the moneys which would otherwise go into the sinking fund for the purchase of bonds, shall remain at the disposition of the mortgagor, to be distributed as dividends, or to be used for the benefit of the business and property in the manner described." *There was no finding of intentional bad faith*; but under the laws of Wisconsin, as construed by her highest court, such conditions rendered the instrument fraudulent in law and void as to creditors, and this Court reversed a decree in favor of the intervenor and overruled his claim that the trustee might not, himself, assail the mortgages. The Court said that the fact that in *Security Warehousing Co. v. Hand* the attempted pledge was characterized as "mere pretense, a sham," did not distinguish that case, and that a conveyance fraudulent in law and void as to creditors may be attacked by the trustee in bankruptcy.

POINT V.

The decree of the Circuit Court of Appeals should be reversed and the decree of the District Court affirmed and reinstated, with costs in all courts.

December, 1911.

JOHN LARKIN,
Of Counsel for Appellant.

[RECEIVED]

John Larkin
Alex. S. Andrews,

Office Supreme Court, U. S.
FILED.

DEC 8 1911

JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

No. 92—OCTOBER TERM, 1911.

LAWRENCE E. SEXTON, AS TRUSTEE IN
BANKRUPTCY, ETC.,

Appellant,

against

KESSLER & CO., LTD., ET AL.,

Appellees.

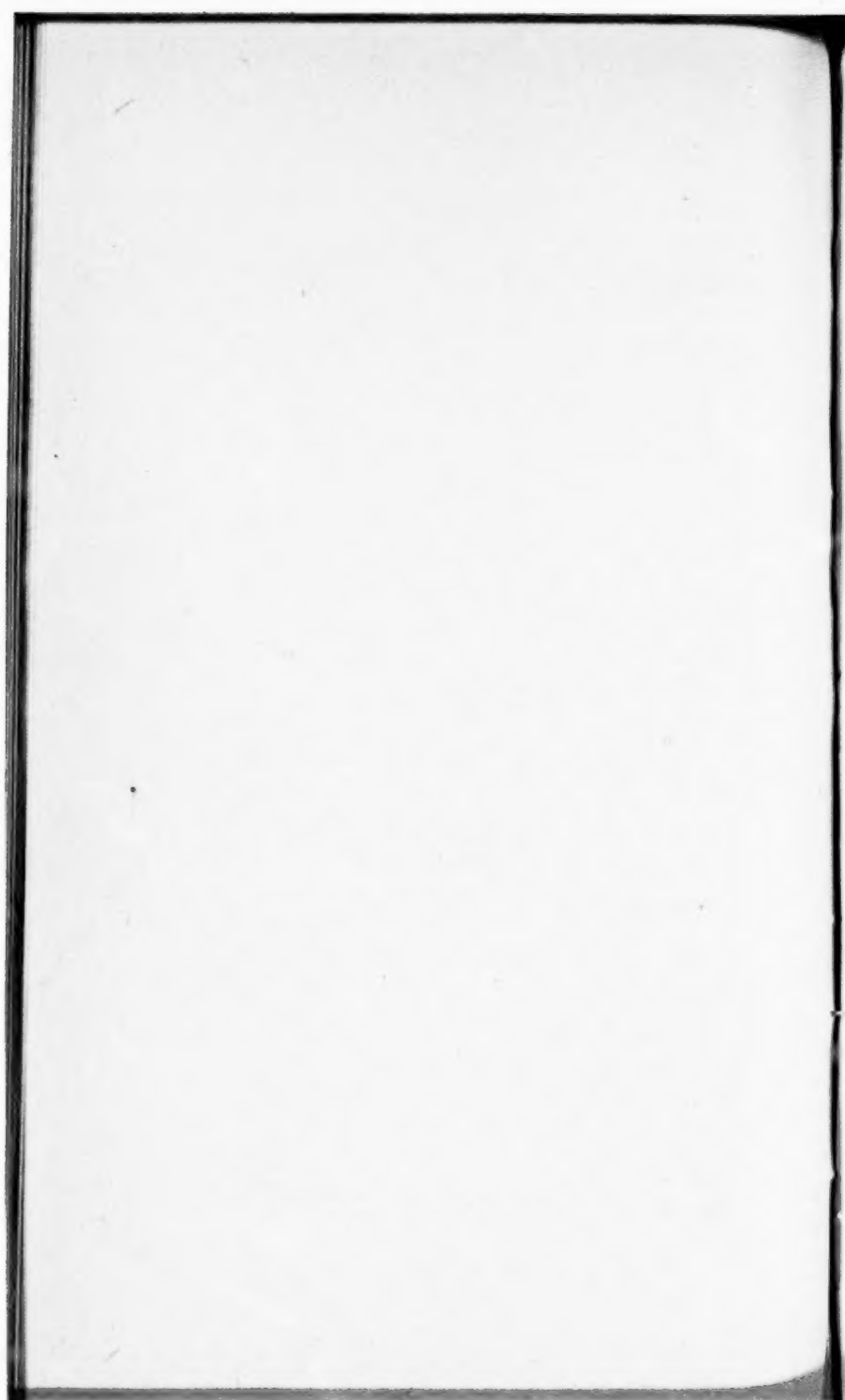
BRIEF FOR APPELLEES.

McLAUGHLIN, RUSSELL, COE & SPRAGUE,
Solicitors for Appellees,

165 Broadway, Borough of Manhattan,
New York City.

ABRAM I. ELKUS,
FREDERICK C. McLAUGHLIN,
RUFUS W. SPRAGUE, JR.,

Of Counsel.



Supreme Court of the United States.

LAWRENCE E. SEXTON, as Trustee
in Bankruptcy of Alfred Kessler,
Rudolf E. F. Flinsch and Will-
iam K. Gillett, composing the
firm of Kessler & Company, and
the said Kessler & Company,
Bankrupts,

Appellant,

against

KESSLER & Co., Limited, and
FRANK YOUATT, Liquidator,
Appellees.

October
Term, 1911.
No. 92.

BRIEF FOR APPELLEES.

Statement of the Proceedings.

This is an appeal by the complainant-appellant Lawrence E. Sexton, as Trustee in Bankruptcy as aforesaid, from a decree in equity of the United States Circuit Court of Appeals, Second Circuit, entered June 9, 1909 (*R.*, 1145), see 172 *Fed. Rep.*, 535, reversing a decree in equity of the United States District Court for the Southern District of New York, entered therein December 4, 1908 (*R.*, 1095), and dismissing on the merits the bill of complaint herein brought in said District Court to set aside an alleged voidable preference.

Statement of Facts.

KESSLER & COMPANY, OF NEW YORK.

On January 1, 1902, the copartnership of Kessler & Company, of New York, was formed for five years, and consisted of Alfred Kessler, Rudolf E. F. Flinsch and William K. Gillett. The capital was \$1,000,000, of which Mr. Flinsch contributed \$400,000, and Mr. Kessler and Mr. Gillett each \$300,000. This copartnership had its office in New York City where it transacted the business of foreign bankers. On January 1, 1907, the partnership agreement was extended for one year, to December 31, 1907.

The copartnership bought and sold bonds, dealt largely in foreign exchange, issued letters of credit, promoted industrial and railroad enterprises and participated in syndicates (*Master's 1st Finding of Fact, R., 1002*).

The predecessor of this copartnership of Kessler & Co. was a copartnership also named Kessler & Company, of which Mr. Alfred Kessler, Mr. Flinsch and Mr. William Kessler (the father of Alfred Kessler) were members. Mr. William Kessler lived in Manchester, England, and was never in this country.

Mr. William Kessler died in January, 1901. Thereafter his interest in the former copartnership was liquidated and paid to his executors, except about \$95,000, which was loaned to the new firm. The further sum of about \$78,000 was loaned by the estate of William Kessler to Alfred Kessler; who in turn loaned a portion of it to Mr. Flinsch (*Master's 2nd Finding of Fact, R., 1004*).

For the first of these loans, the estate of William Kessler is an ordinary creditor of the bankrupt firm and for the second a creditor of Alfred Kessler individually.

KESSLER & CO., LTD., OF MANCHESTER.

In 1902, after William Kessler's death, the corporation of Kessler & Company, Ltd., Manchester, England, was organized, under the English Companies Acts.

It was managed by a board of directors, which consisted of Henry Kessler, Philip W. or P. William Kessler, George Kessler and George A. Averdieck. P. William and George were brothers of Alfred and sons of William Kessler. Henry Kessler was a second cousin of Alfred, P. William and George (*Master's 2nd Finding of Fact, R., 1003*).

The business of the Manchester corporation was manufacturing and dealing in dry goods which it sold all over the world through agents (*Master's 2nd Finding of Fact, R., 1003*).

This corporation succeeded a copartnership doing a like business in England, known as Kessler & Company, of which William Kessler had been a member (*Master's 2nd Finding of Fact, R. 1003*).

Upon his death, the corporation was organized, with a capital stock of £250,000, equally divided between ordinary and preference shares. £108,501 of ordinary shares were owned by the estate of William Kessler and other branches of the Kessler family, and by George A. Averdieck. Of £112,000 in preference shares issued, about one-half was owned by various members of the two branches of the Kessler family, and the balance by strangers. Alfred Kessler, of New York, owned £3,000 of ordinary and £3,000 of preference shares (*Master's 2nd Finding of Fact, R., 1004*).

BUSINESS RELATIONS BETWEEN MANCHESTER AND NEW YORK CONCERNS (*Master's 3rd Finding of Fact, R., 1004*).

Prior to 1903, the New York copartnership drew

what was known as "long drawings," that is to say, drafts payable in sixty or ninety days after sight, on the Manchester corporation, which were accepted on sight by the Manchester corporation. The amount of these drafts constantly outstanding was always about £80,000 (*R.*, 215, 216).

OTHER SIMILAR DRAWING CREDITS OF NEW YORK COPARTNERSHIP.

The New York copartnership had similar drawing credits, both secured and unsecured, with many other foreign houses (*R.*, 503-4, 506-7-8, 511-12, 515, 519, 520, 521, 522, 523-4).

From January 1st, 1907, to October 30th, 1907, a period of ten months, it did a total business of about \$161,000,000, of which approximately four-fifths was foreign exchange (*R.*, 652-3). The margin of profit on such business is very small (about $\frac{1}{32}$ of one per cent.) and consists of interest saved, and any decrease in the rate of exchange between the date of the draft and its maturity (*R.*, 620, 625-6-7). The drawing credit of £80,000, extended by the Manchester corporation, was neither large nor unusual. It had a larger drawing credit with Dreyfus & Co. of Paris, which was unsecured (*R.*, 522).

Before the bills were accepted, they were sold by the New York copartnership to bankers and other persons in New York and the moneys received therefor went into the partnership funds of the New York copartnership and were used by them in their general business.

The New York copartnership undertook and agreed to provide for the payment of these drafts before maturity.

AGREEMENT OF JUNE 30, 1903.

After the formation of the corporation of Kessler & Co., Ltd., the question of security for these

"long drawings" arose between the corporation and Kessler & Co., of New York. Kessler & Co., Ltd., asked for security and finally on February 17, 1903, wrote Kessler & Co. of New York as follows (*Defendant's Exhibit OO, R., 980; Opinion of WARD, J., R., 1133*).

"17 Feb. 3,

Private.

Messrs. KESSLER & Co.,
New York,

Dear Sirs.—We beg to refer to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon. We understand from Mr. Edward Kessler that it would not be very convenient for you to provide this immediately and as we in no wise wish to incommode you, although from the altered circumstances of this firm it is a matter of some importance to us, we propose to give you until the 30th of June of this year by which date the necessary securities should be set aside for us and a list sent us. We do not propose to name a fixed amount of credit, suffice it to say that what you are at present using seems large, and rather than an increase we should like to see it somewhat reduced.

We trust that you may be able to give effect to our wishes even sooner than the date we stipulate for and we remain dear Sirs,

Y'rs, very truly,

P. W. KESSLER."

The amount of drawing credit referred to in this letter was £80,000 or upwards (*R., 215, 216*).

After negotiations by the letter just set forth and otherwise, security was agreed on, and on June 30, 1903, the New York partnership sent the following letter to the Manchester corporation (*R., 938, 889*,

Master's 4th finding, R., 1005, Opinion of WARD, J., R., 1133).

“ KESSLER & CO., BANKERS
No. 54 Wall Street,
New York.

Per S. S. ‘Oceanic.’ JUNE 30, 1903.

Messrs. KESSLER & Co., Limited,
Manchester.

Dear Sirs.—In accordance with instructions from Mr. Alfred Kessler, *we have today placed in a separate package in our safe deposit vaults the following securities, package marked ‘Escrow for account of Kessler & Co., Limited, Manchester.’*

1484 shares Oklahoma Gas & Electric Co., at 25.....	\$37,100
2428 shares United Lighting & Heating Co., at 12.....	29,136
2352 shares Daimler Manufacturing Company, at 50.....	117,600
\$373,000 United Breweries Co. first 6s, at 65.....	242,245
	<hr/>
	\$406,081

This escrow is intended as a protection against our long drawings against your good selves.

Kindly confirm if in order, and oblige,
Yours very truly,
KESSLER & Co.”

On July 8, 1907, the Manchester corporation replied as follows (*R., 889; Master's 4th finding, R., 1006; Opinion of WARD, J., R., 1134*):

“ 8th JULY, 3.

Messrs. KESSLER & Co.,
New York.

Dear Sirs.—We are in receipt of your favor of 30th ultimo in which you advise us

of the securities you have laid aside as security for your long drawings on us. We have noted the particulars as given up to us and the matter goes in order.

If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should, of course, like to see rather better quality. * * *

We are, dear sirs,

Yours very truly,

P. W. KESSLER."

SUBSEQUENT CORRESPONDENCE.

On December 23, 1903, the Manchester corporation sent to the New York copartnership the following letter (*R.*, 890; *Master's 4th finding*, *R.*, 100; *Opinion of WARD, J.*, *R.*, 1134):

"Private.

23rd DEC., 3.

Messrs. KESSLER & Co.,
New York.

Dear Sirs.—For the purposes of the audit of our books for our yearly balance sheet, we shall feel obliged if you would send us, in the form of a certificate, the particulars of the securities you have set aside against your drawing credit with us. We should like this done annually on the 31st December.

We do not think the matter will present any difficulty for you. Something in the form of the enclosed is what we require.

Thanking you in advance, we are, dear sirs,

Yrs. truly,

P. W. KESSLER.

(Enclosure.)

We certify that we have specially set aside and hold for your account on this the 31st day of December, 03, as security for the

drawing credit which you accord us, the following securities.

Name secs. and market value."

Thereafter, on January 1, 1904, the New York copartnership, conforming to these directions, sent the following certificate (*R.*, 891, and *Master's 4th finding, R.*, 1007):

"KESSLER & Co., 54 Wall Street,
Bankers. NEW YORK; 1 Jan., 1904.

Messrs. KESSLER & Co., Lim.,
Manchester.

Dear Sirs.—We certify that we have specially set aside and hold for your account on this the 31st day of December, 1903, as security for the drawing credit which you accord us the following securities:

1484 shares Oklahoma Gas & Electric.....	at 25	\$37,100
2428 shares United Lighting & Heating.....	at 10	24,280
2352 shares Daimler Mfg. Co.....	at 50	117,600
\$36,000 United Brewery New 1st 6% bonds.....	100	36,000
\$50,000 United Brewery New 1st 6% notes.....	100	50,000
\$134,800 Certificate of payments to Trust Co. on a.c. 1st Mortgage bonds of Chicago & Gt. Western R. R.	at 89	119,972
1348 shares Com. Stock C. Gt. W.	at 15	20,220
		<hr/>
		\$405,172

You hold in addition to this

1606 shares United Lighting & Heating.....	10	16,060
		<hr/>
		\$421,232

KESSLER & Co."

On January 20, 1904, the Manchester corporation sent the following to New York (R., 892, *Master's 4th Finding, R., 1008*):

"Private

20 Jan'y 4

Messrs. KESSLER & Co.,
New York.

Dear Sirs.—We are in receipt of your favour of 1st Jan'y in which you give us particulars of the securities you hold in escrow for us against your drawing credit with us. The same are noted.

Should you, in the course of the year, through sale or otherwise, have occasion to vary this deposit, we should feel obliged by your advising us forthwith.

We are, dear sirs,

Yours very truly,

P. W. KESSLER."

The securities in this "escrow" were entered in the "Loan Book" of Kessler & Co., a regular book of account, in *red ink* (denoting money had been borrowed on them or they had been placed "in escrow" (R. 312), the first entry being under date of April 15, 1904 (*Exs. 6-12, R., 879-885*). These entries were headed in each instance "*Escrow Kessler & Co., Manchester.*"

Thereafter about the 1st of January of each year and in August, 1906, a certificate in the same form as above given was sent by the New York copartnership to the Manchester corporation, stating in detail the securities which were thus set aside (R., 907, 922, 923, 929) the receipt of which certificate was always duly acknowledged (R., 909, ff).

Defendants' Exhibit A (R., 889-937) is that portion of the correspondence between the New York copartnership and the Manchester corporation from June, 1903, to October 25, 1907, relating to the securities which were set aside, and shows in detail

the complete history of the so-called "escrows," and the substitutions which were always promptly reported by letter to the Manchester corporation. The original entries in the Loan Book also show what securities were set aside and the substitutions which were made. The lists on the outside of the envelopes in which the securities were contained or to which they were attached, likewise were original entries of the securities set aside, and substitutions were always noted on these lists at the time they were made.

SETTING ASIDE SECURITIES.

At the time that the letter of June 30, 1903, was written and sent, the New York copartnership took the securities therein mentioned, placed them in, or attached them to an envelope, and placed them on a separate upper shelf in a vault of the New York copartnership in a safe deposit company (*Master's 5th Finding, R., 1009*).

The securities which were set aside on June 30, 1903, were never removed from this safe deposit vault until October 25, 1907, except upon two occasions—once in 1906, when Mr. P. W. Kessler, a director of the Manchester corporation, was in New York, when the securities were taken over to the office and he checked them off (*R., 799*), and on a similar occasion in June, 1905 (*R., 914*), when Mr. Frank Youatt, the accountant of the Manchester corporation, was over here and for his examination the securities were produced and checked off by him (*Master's 5th Finding, R., 1009*). Mr. Youatt's letter (*Defendants' Exhibit A. R., 914*) shows that the securities checked up by him were all in order and correct according to the letters and certificates.

This envelope had written upon it "Escrow of Kessler & Co. of Manchester," and a detailed list

of the securities, with the values placed upon them (*Master's 5th Finding of Fact, R., 1009*), upon which list substitutions were noted at the time they were made, so that the list was at all times a correct detailed statement of the securities set aside, and corresponded exactly with the reports contained in the letters (*Exhibit A, R., 882-937*), with the entries in the Loan Book (*R., 879-885*) and with the certificates which were sent periodically.

The vault consisted of two parts, divided by a shelf. In the lower part was placed the leather box in which the securities in daily use by the New York copartnership were kept, and this box was taken to and from the safe deposit vault to the office every day (*R., 325, 836*). Upon the upper shelf were placed, in separate packages, the securities belonging to customers and persons other than the copartnership (*R., 836*).

Whenever substitutions were made in the securities, a letter was immediately written by the New York copartnership to the Manchester corporation informing them what securities had been taken, or what moneys had been collected from the so-called escrow, and exactly what securities had been substituted in place thereof (*Exhibit A, R., 882-937, and Master's 6th Finding, R., 1009 and R., 1038*).

At all times there was an estimated margin of security over the amount of liability by reason of these long drafts (*Loan Book, Complainant's Exs. 6-12; R., 879-885*).

ENTRIES IN BOOKS OF NEW YORK COPARTNERSHIP.

Among the regular books of account kept by the New York copartnership was a "Loan Book" (*R., 291*) above referred to.

The Master erroneously said this was a "memorandum book." Mr. Magee, the cashier of the New York copartnership, was the custodian of all

securities (*R.*, 303), and the Loan Book was the book in which he entered all securities which had been deposited by the New York copartnership as collateral for loans.

In this Loan Book was entered, under the heading "Escrow of Kessler & Co., of Manchester," a detailed list of the securities which had been set aside in pursuance of the letter of June 30, 1903 (*R.*, 879, *Master's 7th Finding*, *R.*, 1009). The first detailed entry appears under date of April 15, 1904. As substitutions were made in the securities, the entry itself was altered by striking out the security taken away and interlining the security substituted and its value. These entries as to Kessler & Co., Ltd., were in *red* ink, which denoted that the partnership of Kessler & Co. had borrowed money on the securities or put them in escrow (*R.*, 312).

When this had been done for some time and the entry had become overwritten because of these interlineations new entries on fresh pages were made, so that fresh entries of these securities were carried over under date of April 15, 1904, October 14, 1904, November 2, 1904, January 4, 1905, July 15, 1905, October 22, 1907 (*Complainant's Exs. 6-12*; *R.*, 879-885).

The entry under the last date is set forth in the *Master's Report (7th Finding of Fact, R., 1010)*.

**£60,000 UNPAID AGAINST THE SECURITIES ABOVE
MENTIONED AND £20,000 AGAINST THE "SPECIAL
ESCROW."**

The amount of long drafts drawn against these securities between June, 1903, and October, 1907, was always over £60,000 sterling (*R.*, 215, 216), and on October 25, 1907, there were outstanding drafts by the New York copartnership, accepted by the Manchester corporation, secured by this first setting

aside of securities, amounting to £60,000 sterling and in addition £20,000 sterling accepted drafts against the "special escrow" herein later referred to (*R.*, 253). A list of these outstanding drafts is given in *Complainant's Exhibit 73* (*R.*, 886), and the drafts are in evidence (*Defendants' Exs. V, W, X, Y, Z, AA, BB, CC, DD, FF, HH, KK, LL; R.*, p. 945 to p. 977). These drafts all matured on and after November 8, 1907, and owing to the failure of Kessler & Co. to perform their agreement by forwarding funds in advance of maturity to take up the drafts Kessler & Co., Ltd., went into a voluntary winding up under the English Companies Acts on November 11, 1907, Mr. Frank Youatt being chosen as Liquidator by the shareholders. The Manchester corporation had to pay and did pay all these drafts.

SPECIAL ESCROW OF £20,000.

On August 27, 1907, the New York copartnership wrote to the Manchester corporation a letter in part, as follows (*Master's 8th Finding, R.*, 1011) :

"KESSLER & Co.,
Bankers.

54 Wall Street,
NEW YORK, 27 Aug., 1907.

Messrs. KESSLER & Co., Lim.,
Manchester.

Dear Sirs.—A few days ago we sold at 90 1/2 and int. \$20,000 Muskogee Gas & El. Bonds and withdrew them from your escrow replacing them by \$20,000 Orleans County Quarry Bonds 1st 6%'s at 90.

We cabled you to-day we had drawn £20,000 60 d.s. on your goodselves and have placed in a separate escrow against this the following :

\$25,000 Orleans Co. Quarry 1st 6s at 90.....	\$22,500
Note \$10,000 Orleans Co. Quarry secured by bonds at 75 Nov. 7...	10,000
Note \$10,000 Orleans Co. Quarry secured by bonds at 75 Nov. 7...	10,000
Note \$4,775 Orleans Co. Quarry secured by bonds at 75 Nov. 7...	4,775
Note \$8,000 R. B. Maclea Co. Due Dec. 5.....	8,000
Note \$7,000 R. B. Maclea Co. Due Dec. 5.....	7,000
Note \$5,000 R. B. Maclea Co. Due Dec. 5.....	5,000
Note \$16,000 Milne, Turnbull & Co., Nov. 11.....	16,000
Note \$17,000 Milne, Turnbull & Co., Dec. 27.....	17,000
Note \$7,000 Milne, Turnbull & Co., Dec. 27.....	7,000
	<hr/>
	\$107,275

Yours truly,

KESSLER & Co."

The Manchester corporation replied as follows
(Master's 8th finding, R., 1012):

" Private.

4th SEPT. 7.

Messrs. KESSLER & Co.,
New York.

Dear Sirs.—We note from your favor of the 27th ulto. the change you have made in our escrow.

We also take note of the securities which you have lodged in a separate escrow against your special drawing of £20,000 about which you cabled us and which you advise in your ordinary correspondence received to-day.

We anticipate that this special drawing will not be renewed and that your drafts on us generally will presently come to a more moderate level.

Very truly yours,

P. W. KESSLER."

The securities were placed in a separate envelope endorsed "Special Escrow, Kessler & Co. of Manchester" marked with a detailed list of securities contained therein and placed on the same shelf in the same vault. Substitutions in this escrow were similarly made and reported (*Master's 8th Finding, R., 1013*).

An entry was made at page 154 (*Complainant's Ex. 12; R., 885*) of the same Loan Book "Special Escrow, Kessler & Co., August 27, 1907, £20,000, 60 days' sight," giving a detailed list of the securities set aside, and any change or substitution in the securities was carefully noted in the same book in the same way down to and including October 10, 1907 (*Master's 8th Finding, R., 1014*).

Four drafts of £5,000 each were drawn on August 27, 1907, by the New York copartnership against the Manchester corporation against this special escrow of £20,000 (*Defendants' Exs. V, W, X, Y; R., 945-948*). These drafts were sold to J. & P. Coats, Ltd., of Newark, N. J., for \$97,550, the money was received by the copartnership and placed in the copartnership funds, and the drafts were accepted on September 7, 1907, by the Manchester corporation (*Master's 25th Finding, R., 1037*). The New York copartnership suspended payment under general assignment filed by Alfred Kessler before any of said drafts matured, and the Manchester corporation has been called upon to pay and has paid all of said drafts.

NATURE AND CONDITION OF THE SECURITIES IN THE "ESCROWS."

The securities in these "escrows" are minutely detailed in the *Defendants' Exhibit QQ. (R, 980 to 997)*. They were bonds, certificates of stock, promissory notes, a certificate of participation in a syn-

dicate of the Western Pacific Railroad Company bonds, and a deed in blank of and an assignment of mortgage in blank on certain real estate, 1018, 1020 and 1022 Bedford avenue, Brooklyn, New York. All the bonds were bearer bonds, none were registered. The stock certificates were made out either in the name of Kessler & Company or its individual partners or its employees and *in each instance* were duly endorsed in blank with a power of attorney to transfer in blank signed by the persons in whose name the certificate was made out, and duly witnessed. In almost every instance these endorsements and powers to transfer were dated, and the dates cover various times from 1901 to the early part of 1907, except the Elkton Mining stock. The deed of and the assignment of mortgage on the Brooklyn realty were dated and acknowledged November, 1905, and February, 1903, respectively. The promissory notes were as follows: three notes of Milne, Turnbull & Company, one dated July 11, 1907, and two dated August 27, 1907, and one note of R. B. Maclea & Company dated August 5, 1907, each of which notes was payable to the order of Kessler & Company and duly endorsed in blank by Kessler & Company; and four notes of the United Breweries Company dated September 17, 1903, payable to the order of the United Breweries Company and each duly endorsed in blank by the payee. The due dates of all these notes were subsequent to October 25, 1907.

MANCHESTER CORPORATION TAKES PHYSICAL POSSESSION OF SECURITIES.

On October 25, 1907, Henry Kessler, who was in this country, after being advised so to do by counsel, at a time when, appellees contend, neither

Henry Kessler nor counsel knew or had any reasonable cause to believe Kessler & Co., the New York partnership, was insolvent, if such was then the fact, went to Alfred Kessler and said he wanted to take the securities in the two "escrows." Alfred Kessler replied: "*All right. They are yours. Do what you like*" (R., 125-6, 252, *Master's 9th Finding of Fact*, R., 1015). Thereupon Henry Kessler went to the vault with an employee of the New York partnership, removed the separate "escrow" packages of securities, hired a new vault in the name of the Manchester corporation, and placed the securities therein. He executed instruments by which he authorized certain clerks of the New York copartnership, as the agents of the Manchester corporation, to make future substitutions from time to time as required in the securities (R., 1016, 1018), which is hardly consistent with a belief by him that the New York corporation was then insolvent. Later, after a general assignment had been made in the name of the New York copartnership he revoked the appointment of these clerks and designated in their place Mr. Bacon and Mr. Kissell, bankers, took the securities to the Hanover Safe Deposit Company in New York, and placed them in a box rented by Kessler & Co., Ltd., where they have remained ever since.

On October 25, 1907, the New York copartnership informed the Manchester corporation by letter of the actual delivery to Henry Kessler, director, of the securities in the so-called escrows (*Master's 11th Finding of Fact*, R., 1020, R., 936).

On October 25, 1907, a draft for £5,000 (*Ex. DD*), dated October 15, 1907, drawn by the New York partnership on the Manchester corporation, was accepted by the Manchester corporation (*Master's 12th Finding of Fact*, R., 1022).

This last mentioned draft is owned by the Colonial Bank, which, it is admitted, is a creditor of

Kessler & Co., Limited, of Manchester, England, in voluntary liquidation, and which has received payment from the liquidator of the Manchester corporation (*Master's 12th and 29th Findings of Fact, R., 1023, 1039*).

GENERAL ASSIGNMENT AND BANKRUPTCY OF KESSLER & COMPANY, OF NEW YORK.

On October 30, 1907, Alfred Kessler executed a general assignment under the laws of New York for benefit of creditors in the name of the New York copartnership, to a Mr. Williams (*Complainant's Ex., 55, R., 562; Master's 19th Finding, R., 1029*). This assignment was executed by Mr. Kessler only, although Mr. Gillette was in New York City. Mr. Flinsch was in Europe or on his way to America.

On November 8, 1907, a petition in bankruptcy was filed, *alleging the general assignment as the sole act of bankruptcy*, and Mr. Sexton was appointed receiver (*Master's 20th Finding, R., 1029*).

MR. FLINSCH'S VISIT TO EUROPE.

Mr. Flinsch, one of the partners of the New York firm, went to Europe in June, 1907. He went principally on account of his health (*R., 499*), but also visited various banking houses in Europe, with which his firm had been transacting business. He had considerable correspondence with his copartner, Mr. Alfred Kessler, with reference to the affairs of the firm. This correspondence (*Complainant's Exs., 14-37; R., 687 to 735; Exs., 49-51, 53, 54, 57, 59, 61, 63, 66; R., 757-761, 764, 765, 770, 772, 776, 778, 781*) tends to show that the drawing credit of the New York copartnership as to its foreign exchange business was somewhat reduced, that some difficulty was encountered in selling bills on Dreyfus

of Paris, and that the firm, like most other American banking houses at that time was feeling the effect of the conditions which preceded the panic in the fall of 1907, and had its particular worries which are set forth at great length in these letters. There is not the slightest intimation in any of them that the firm was insolvent or that its standing and credit in the financial world was under the slightest suspicion or by any one questioned.

Mr. Flinsch, while in Europe, saw Mr. P. William Kessler on two occasions--once in Frankfort, Germany (*R.*, 529, 530, 534), and later at Manchester, England (*R.*, 539, 540), and at the latter interview, on October 5th, 1907, told him of the difficulty which then existed in selling American bills in London, and asked the assistance of the Manchester corporation either by the sale of drafts to be drawn by the latter against securities to be furnished, or in obtaining a direct loan upon such securities.

KESSLER & CO., LTD.'S, KNOWLEDGE OF NEW YORK FIRM'S CONDITION.

As a result of this last visit, P. W. Kessler evidently became apprehensive that the outstanding long drawings by the New York copartnership on the Manchester corporation might have to be met by the latter and on October 7, 1907, cabled to Henry Kessler that the position of Kessler & Company of New York was unsatisfactory and that he (P. W. Kessler) was not in favor of extending further credit than the £80,000 already given, and advised the selling of securities by Kessler & Company of New York (*R.*, 548). In other words, he did not take kindly to the suggestion (*R.*, 542) that his company should assume further responsibilities. He saw little prospect of negotiating any loan at

that time and could only advise the sale of securities in New York. The difficulty which Mr. Flinsch stated to Mr. P. W. Kessler was not in obtaining sufficient drawing credit; it was the difficulty in selling the bills on Dreyfus of Paris.

Mr. Flinsch did not return to this country until the first week in November, 1907, after the general assignment had been made. Gillette, the other copartner of the firm of Kessler & Company, of New York, had been in Europe during the summer of 1907, and he returned to this country in August, 1907, but did not pay any attention to business, claiming to be ill, and refusing to come to the office or to aid the firm in its affairs (*Master's 19th Finding, R., 1029*).

The copartnership met all its obligations promptly until October 30, 1907 (*Master's 20th Finding, R., 1039*), and sold "all the exchange it needed" on October 28th and 29th, 1907, after the actual delivery of the securities. Its inability to sell exchange to meet its moderate obligations which would mature later that week occurred on the afternoon of October 29, 1907, and precipitated the general assignment. Mr. Henry Kessler wrote to Mr. P. William Kessler, of Manchester, on October 25, 1907, a letter graphically describing the panic on Wall street, and naturally apprehensive as to whether the New York partnership could continue to sell its drafts under such conditions.

THE INSOLVENCY OF THE NEW YORK FIRM.

The Master found and the District Court confirmed his findings that money was difficult to borrow in the week of October 25, 1907, that there was no substantial change in the affairs of the firm from October 25th to November 8th, and other facts with reference to the financial condition of the New York firm, including the failure on Nov-

ember 13, 1907, of Milne, Turnbull & Company, a copartnership engaged in the dry-goods business which the New York firm was assisting in financing.

The Master has set forth in full in his report numerous letters passing between P. W. Kessler, one of the directors of the Manchester corporation, and his brother Alfred Kessler, in which the affairs of the New York firm are somewhat discussed.

During the entire period from June 30, 1903, to October 25, 1907, the New York firm had, before the drafts became due, either remitted the money to the Manchester house to meet them, or arranged for their payment (*Master's 26th Finding of Fact, R., 1037*).

The schedules of the firm of Kessler & Company (*Complainant's Ec. 74 A., R., 887, 888*), showed an excess of liabilities over assets of about \$250,000 (*R., 1038*). The securities in the "escrows" were valued in the schedules at \$495,000 (*R., 887*). One of the appraisers appointed in the bankruptcy proceeding valued these securities at \$257,495 (*R., 864*), stating, however, that these valuations were based upon the failure of Kessler & Company, of New York (*R., 865, 866*), and many of the securities were participations in syndicates of which the New York firm were managers. The liabilities, secured, were \$2,414,337.83; unsecured, \$1,403,723.36 (*Twenty-eighth Finding of Fact, R. 1038*). Kessler & Co., Ltd., were scheduled as secured creditors, the security being the "escrow" securities, in the amount of \$377,815.73 (*R., 887*). *The schedules of the individual partners were not placed in evidence.*

THE 1,606 SHARES OF UNITED HEATING, LIGHTING & POWER COMPANY IN MANCHESTER.

The Master found (*R.*, 1064) that 1,606 shares of United Heating, Lighting & Power Company stock, which were in the list as being held with the other securities, and which, in fact, had been actually turned over in January, 1904, to the Manchester concern (*R.*, 1036, 1064) were held as a valid pledge. 10,000 shares of Elkton Mining Company stock were, on October 25, 1907, in the hands of the brokers of the New York co-partnership in Colorado. These shares arrived in New York after October 30, but before the petition in bankruptcy was filed, and were turned over with the other securities to the Manchester corporation (*R.*, 1036).

FINDINGS AND CONCLUSIONS.

Neither the Master nor the District Court found fraud, actual or constructive, or questioned the good faith of the parties. The Circuit Court of Appeals emphasizes the absolute good faith and honest intention of both Kessler & Co. and Kessler & Co., Ltd., and finds against appellant's contention of actual or constructive fraud. *The agreement for security was concededly enforceable in equity, inter partes.* The Circuit Court of Appeals has rightly reversed the District Court's decree setting aside the transaction of October 25th, 1907, as a voidable preference.

SUMMARY OF APPELLEES' POINTS.

The points relied on by the appellees and set forth below are :

I.

Appellees' right to the securities under the contract was absolute as against the bankrupts and their creditors at all times since June 30, 1903.

II.

The subsequent intervention of bankruptcy could not defeat appellees' right to the securities.

III.

The bankrupts' general creditors had no property right in the securities and appellees' contract was enforceable as against creditors.

IV.

The Circuit Court of Appeals was right in reversing the decree of the District Court.

V.

The authorities relied on by appellant are not applicable.

VI.

There was no reasonable cause for appellees to believe that a preference was intended by the delivery of the securities on October 25, 1907.

VII.

The decree of the Circuit Court of Appeals should be affirmed.

POINTS.

I.

Appellees' right to the securities under the contract was absolute as against the bankrupts and their creditors at all times since June 30, 1903.

(a) THE CONTRACT TRANSFERRED THE GENERAL PROPERTY IN THE SECURITIES.

In other words it was a valid mortgage.

Appellant insists (1) that it was an agreement for a pledge and nothing else, and (2) because physical possession of the scrip was not retained by the Manchester house the agreement was void as against simple contract creditors.

We employ the word "scrip" throughout this brief as a convenient term, to denote the stock certificates, bonds, notes and other documents which were in the package.

The distinctions between a pledge and a mortgage of *goods and chattels* at common law are that (1) a mortgage is a *conveyance which transfers the general property*, while a pledge transfers only a special property by *delivery* of possession; (2) in the case of a mortgage which transfers the general property possession in the creditor is not essential, whereas possession in the creditor is of the very essence of a pledge; (3) a mortgagee's title becomes absolute upon default, while a pledgee can sell after default only upon notice to the pledgor.

Story on Bailments, 9th Ed., Sec. 287;

Parshall vs. Eggert, 54 N. Y., 18;

Buffalo German Ins. Co. vs. Bank,
162 N. Y., 163, 170;

Wilson vs. Little, 2 N. Y., 443.

The distinction between a mortgage and a pledge of *incorporeal personalty* is not so apparent, and indeed it was for some time doubted whether such intangible property could be the subject of a pledge. It is incapable of manual delivery and cannot be reduced to possession. It is now settled law in New York that the only substantial difference between a mortgage and a pledge of incorporeal personalty is in the contract. If the contract gives the debtor a legal right to redeem upon payment of the debt at any time before actual sale, although after default, it is a pledge. Otherwise it is a mortgage.

Wilson vs. Little, 2 N. Y., 443.

Stock already pledged and in the possession of a pledgee can be again pledged, without delivery of the scrip, to a third person, for a new loan. In *First Nat. Bank vs. Bacon, 113 N. Y. App. Div., 612, 614*, which so holds, the Court says:

“The scrip is not the stock itself, and as to property not capable of manual delivery a pledge may be created by a written transfer thereof (*Wilson vs. Little, 2 N. Y., 445*).”

A pledge of stock is therefore like a mortgage, a transfer of the stock, and there can be no manual delivery. Possession of the scrip is of no importance. Physical possession of goods and chattels is an indicia of ownership. The statutes of New York, following the common law, emphasize the distinction. They make a sale or assignment by way of security of goods and chattels, except mortgages, without change of possession, *presumptively* fraudulent as against creditors (*N. Y. Personal Property Law, Section 36, former Section 25*) and further declare unfilled mortgages of goods and chattels void as against simple contract creditors (*N. Y. Lien Law, Section 230, former Section 90*).

Neither of these statutes applies to incorporeal personalty or choses in action (*Niles vs. Mathusa*, 162 N. Y., 546; *Booth vs. Kehoe*, 71 N. Y., 341; *Young vs. Upson*, 115 Fed. Rep., 192; *National Bank vs. Chaskin*, 28 App. Div., 311, and cases cited). There is no requirement in our law such as is found in the Louisiana statute, that delivery of the scrip shall accompany a sale or transfer by way of security of property of this description or that a mortgage of it shall be filed.

In *Stackhouse vs. Holden*, 66 App. Div., 423, the Court, discussing an assignment of book accounts, said :

“Aside from the provisions of the bankrupt law prohibiting preferences, and subject to the rules of law relative to transfers of goods and chattels, debtors may transfer and pledge their personal property to their creditors in any manner they see fit, and any attempt to apply fixed rules for the transaction of the business would interfere with this undoubted right.”

Even in the case of goods and chattels, where the presumption of fraud is rebutted, there is not the slightest doubt under the New York decisions, that sales and transfers by way of security (other than mortgages) without change of possession (the possession remaining in the debtor) are valid as against creditors or even *bona fide* purchasers without notice.

Parshall vs. Eggert, 54 N. Y., 18.

Farmers' & Mechanics' Bank vs. Logan, 74 N. Y., 568, was a case where the plaintiff bank loaned the money for the purchase of wheat, making a draft on the borrower for the amount of the loan. The goods were shipped under bill of lading which stated shipment on account and order of the plaintiff with instructions to notify the borrower.

The wheat was delivered to the borrower upon his acceptance of the draft, under agreement that he was to hold it in trust, as security for the payment of the draft. The borrower sold the wheat to defendants, who were innocent purchasers for value, without notice.

Judgment for plaintiff for value of the wheat was affirmed. The Court says :

“ Thus the case is kept out of the law governing the relations of pledgor and pledgee. The plaintiff was not a pledgee of the property of Brown. It had a right to it, not the qualified and special property of one holding, as a security, a chattel belonging to another. It had the legal title, under an agreement to transfer it on payment being made ; it ‘ held the title in trust for Brown ’ after its own claim was satisfied (*Bank of Toledo vs. Shaw*, 61 N. Y., 283). ”

The case of *Bank of Rochester vs. Jones*, 4 N. Y., 497, is here cited and followed.

See also

Moors vs. Kidder et al., 106 N. Y.,
32.

Where merchandise is turned over by a bank to a merchant for purposes of sale, the bankers having advanced the purchase money and taken the bills of lading in their own name and the intention of the agreement being to preserve the banker's title to the goods, the lien of the banker is superior to the rights of third persons who have advanced money to the merchant upon a promise by the latter to pay them out of the proceeds, notwithstanding the fact that possession with all the indicia of ownership and full power of disposition by sale was at all times in the borrower.

Munroe vs. Bonanno, *Abbott's New Cases*, XXXI, p. 1.

Carter vs. Arguinbau, Abbott's New Cases, XXXI, 3 N. Y. Common Pleas.

English Bank of Rio de Janeiro vs. Parr, Abbott's New Cases, XXXI, page 7; and

Dennistown vs. Parr, Abbott's New Cases, XXXI, p. 21.

In *Bank of Rochester vs. Jones, 4 N. Y., 497*, the plaintiff discounted Foster's draft on defendant to put him in funds to purchase 200 pounds of flour. Foster shipped the flour to defendant and delivered the freight receipt to plaintiff. Plaintiff pinned the freight receipt to the draft and sent both to defendant, requesting defendant to accept the draft and take the flour. Defendant took the flour and sold it, without accepting the draft, claiming the right to apply the proceeds against Foster's general indebtedness to him.

Plaintiff sued defendant in trover, *claiming legal title.*

Judgment for defendant reversed. PAIGE, J., said :

"The true ground on which to sustain this transfer of property to the bank is by regarding the transaction as a sale to the bank in trust; to deliver the property to Jones, in case he accepted the draft; and if he refused to accept the draft, then to sell the flour and retain out of the proceeds the amount of the draft, and to pay the surplus to Foster. The transaction between Foster and the bank may also, I think, be regarded as either a pledge or a mortgage of the flour."

In *National Bank of Deposit vs. Rogers, 166 N. Y., 380* (discussed later), the Court of Appeals reached the same conclusion in equity, although

no freight receipt was delivered and there was no such constructive delivery. In equity, as we shall show later, the *contract* takes the place of the bill of lading or assignment.

The New York cases leave no room for doubt on the proposition that valid security may be created on all kinds of personal property by agreement without change of possession and control, except (1) in the case of *goods and chattels* where the presumption of fraud is not rebutted, and (2) an unfiled mortgage of *goods and chattels* is void by statute against general creditors. The rule is so stated in *Purshall vs. Eggert*, 54 N. Y., 18.

In our case we contend that the facts are strong enough to support a finding that the general property, that is the *legal* title, actually passed to the Manchester house on June 30, 1903, by the mutual assent of the parties evidenced by the consummated acts of the parties constituting the transfer.

Benjamin on Sales, 7th Ed., Section 3, reads :

"By the common law, all that was required to give validity to a sale of personal property, whatever may have been the amount or value, was the mutual assent of the parties to the contract."

Of course the act constituting the transfer must be consummated, and not remain incomplete or rest in mere intention.

Martin vs. Funk, 75 N. Y., 134, 137.

The act constituting the transfer was here consummated when the securities were endorsed, done up in a package, marked with the name of the Manchester house as its property, set aside apart from the bankrupt's own property in the place where the property of other people was kept, entered upon the books of the bankrupt as property of the

Manchester house and a letter written by the transferor, declaring the transfer, signed and sent to the transferee.

Positively the only power over these securities left to the debtor was to remove particular securities for purpose of sale, provided other securities of equal value were substituted.

In full reliance upon this consummated transfer of title and upon the faith of it the Manchester house extended to the bankrupt a credit of £80,000. It is against good conscience to deny to this contract and what was done under it the full force and effect clearly intended by the parties. *A bill of sale could not have made that intention any clearer.* The contract of June 30, 1903, is a perfectly intelligible agreement between two business houses. It is not ambiguous. Both parties clearly understood an assignment of this property to the Manchester house in trust for the purposes of this security.

Thereafter not one act inconsistent with the ownership of the property by the Manchester house was committed. By the letter of July 8, 1903, (*R.*, 889) for obvious reasons of necessity and convenience, the New York house was created agent of the Manchester house to sell any of the securities from time to time at a fair price, and to replace them with others of equal value. The hope was expressed that the quality of the "escrow" might be gradually improved by these operations. *This authorization of July 8, 1903, was in itself an act of ownership.*

The parties themselves always regarded the Manchester house as owner of the securities. The New York firm invariably wrote to defendant in regard to the escrow as "your escrow." On the first of every year and in August, 1906, they rendered to the Manchester house a formal certificate

of the securities "set aside and held for your account," as security for the long drawings. The securities were regularly entered in the books of the New York firm as having been deposited as security for loans. Mr. P. W. Kessler of Manchester, in November, 1906, stated to Mr. Flinsch and Mr. Alfred Kessler that he had checked off "our" securities (*R.*, p. 799). When Mr. Henry Kessler went to Mr. Alfred Kessler on October 25, 1907, and told him he had been advised to take the securities, the latter replied: "They are yours, do what you like with them" (*R.*, pp. 125, 1015). They were immediately surrendered by the New York firm upon request. On two previous occasions when representatives of the Manchester house were in this country they were surrendered to them for inspection and carefully checked off and a report made to the Manchester house.

The Manchester house accepted drafts to the amount of about £80,000 upon the faith of this written contract pursuant to which the securities were endorsed, actually delivered in 1905 and 1906, set aside and held as its property. Under the New York decisions the Manchester house held the legal title to the securities under a sale in trust, to deliver them to the bankrupts if the drafts were paid by the latter, otherwise to sell the securities and retain from the proceeds the amount of the drafts and to pay the surplus, if any, to the bankrupts. *Bank of Rochester vs. Jones*, *supra*; *Farmers' & Mechanics' Bank vs. Logan*, *supra*; *Moors vs. Kidder*, *supra*; *Manro vs. Bonanno*, *supra*; *Carter vs. Arguinban*, *supra*; *English Bank of Rio de Janeiro vs. Parr*, *supra*; *Dennistown vs. Parr*, *supra*; *Parshall vs. Eggert*, *supra*.

In *Farmers' & Mechanics' Bank vs. Logan*, *supra*, the bank loaned the money to buy the wheat, took a bill of lading of it, but afterwards

surrendered the bill of lading and the wheat to the debtor, under an agreement that the wheat was pledged as security for the advances. In our case, the Manchester house accepted the drafts, after the securities had been endorsed, delivered, and set aside as its property, under an agreement that they should be security against the long drawings. In all the foregoing New York cases the property was *goods and chattels*, and the physical control was surrendered by the creditor. *Parshall vs. Eggert, supra*, clearly states the rule as to this kind of property.

There can be no doubt, under these decisions, but that the general property in the escrow passed to the Manchester house.

Inasmuch as our securities were properly indorsed for delivery we had no occasion to resort to a court of equity even prior to October 25, 1907, when we took possession of the scrip, to cure any defect in our title.

(b) THE CONTRACT WAS AT ALL TIMES ENFORCEABLE IN EQUITY AGAINST THE SPECIFIC PROPERTY SET ASIDE.

Whether the transaction was a declaration of trust, as Judge WARD said in the opinion of the Circuit Court of Appeals below, or an agreement for a mortgage or an agreement for security, is to our mind unimportant.

Judge NOYES, in his concurring opinion holds that the transaction could not be a declaration of trust because the New York house "intended to set aside the obligations only as *security* for their indebtedness to the Manchester house" (*see Opinions of Judges WARD and NOYES, R., 1133, 1138*).

In *National Bank of Deposit vs. Rogers, 166 N. Y., 380*, Judge LANDON said:

"Thus, when S. & Co. obtained posses-

sion of the goods, plaintiff held their contract which characterized their possession *as in trust for plaintiff's security*, and equity requires that such characterization shall be taken as true, to the end that the security both parties agreed upon and intended shall not fail" (see also *Barry vs. Lambert*, 98 N. Y., 300, and cases cited).

Judge WARD has, therefore, correctly stated the New York law.

We prefer, however, to rest our argument under this heading, upon the broader ground that there was a present agreement for security upon specified property. Or, as Judge NOYES puts it, "a pre-existing right well founded in equity." A court of equity will construe and enforce the contract according to the intent of the parties, if it is such a contract as can be equitably enforced by a decree *in personam*. In equity, therefore, it is immaterial whether the general property passed or not. The only question is whether it is such a contract as can be enforced by decree in equity.

The wording of the agreement was:

"We certify that we have specially set aside and hold for your account on this 31st day of December, 1903, as security for the drawing credit which you accord us, the following securities" (here follows an itemized list).

The meaning of the word "escrow."

On June 30, 1903, the New York firm wrote:

"We have placed in a separate package * * * the following securities, package marked 'Escrow for account of Kessler & Co., Limited, Manchester.' * * * This escrow is intended as a protection against our long drawings against your good selves."

To which the Manchester corporation replied:

"We are in receipt of your favor of the 30th ultimo in which you advise us of *the securities which you have laid aside as security for your long drawings on us.*"

Thereafter, the parties in their letters refer to "the securities you hold in escrow for us against your drawing credit with us" or to the securities that "we have specially set aside and hold for your account. * * * as security for the drawing credit which you accord us," and like expressions, leaving no doubt whatever what the parties meant by the use of the word "escrow." In the words of Judge LANDON, quoted above from *National Bank of Deposit vs. Rogers, supra*, they meant a "contract which characterized their (the New York firm's) possession as in trust for plaintiff's (Manchester corporation's) security."

A present agreement for security.

They both intended *a present agreement for security upon specified property.*

The right is usually given the debtor, in agreements of this character, to change the contents of the package, by proper substitution. When the nature of the property is considered, the absolute necessity of such an arrangement for the protection of both parties, is apparent. Sometimes, as in many of the cases previously cited, it is necessary to sell the property in the regular course of business, and apply the proceeds to the payment of the debt, and the debtor is given this power. There is no requirement that the property must remain intact, or within the physical control of the creditor. It must, however, be appropriated by the agreement to the purposes of the security, and at all

times be capable of identification so that a court of equity can decree specific performance.

Like the agreement in *Mitchell vs. Winslow*, 2 *Story*, 630, and in *Holroyd vs. Marshall*, 10 *House of Lords Cases*, 191, this agreement related to all the securities then placed in the package and to all which might thereafter be placed in the package by way of substitution or renewal.

The subject-matter of this suit is the property which was properly in that package on October 25, 1907, under the terms of the agreement.

In *Holroyd vs. Marshall*, which is, perhaps, the leading case on the doctrine of equitable assignment, the written contract contained this clause :

“That all machinery * * * which, during the continuance of this security, shall be fixed or placed in or about the said mill * * * in addition to or substitution for the said premises, or any part thereof, shall * * * be subject to the trusts * * * hereinbefore declared and expressed concerning the said premises.”

The debtor remained in possession and sold and exchanged some of the old machinery and introduced some new machinery. No conveyance was made of this new machinery, and the creditor never took possession of it until after an execution was levied.

Held, that the title under the bill of sale was to be preferred to that of the judgment creditor.

The Lord Chancellor (Lord WESTBURY) said in part :

“My Lords, the question is, whether as to the machinery added and substituted since the date of the mortgage, the title of the mortgagees or that of the judgment creditor ought to prevail. * * * It is also admitted that if the mortgagees had an equit-

able estate in the added machinery, the same could not be taken in execution by the judgment creditor.

The question may be easily decided by the application of a few elementary principles long settled in Courts of Equity. In Equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of Equity will decree specific performance. In the language of Lord Hardwicke, *the vendor becomes a trustee for the vendee*; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate but also of contracts relating to personal property, *provided that the latter are such as a Court of Equity would direct to be specifically performed.*"

Holroyd vs. Marshall, *supra*, was followed in *McCaffrey vs. Woodin*, 65 N. Y., 459; *Central Trust Co. vs. West India Co.*, 169 N. Y., 31.

Cases like *Rochester Distilling Co. vs. Rasey*, 142 N. Y., 570, are not *contra*, because they are actions at law where plaintiff's claim rests upon legal title. In *National Bank of Deposit vs. Rogers*, 166 N. Y., 380, the plaintiff first brought his action at law, and his complaint was dismissed because clearly the legal title followed the bill of lading and was in defendant. Later the complaint was amended, alleging equitable title, and recovery was sustained by the Court of Appeals.

Mitchell vs. Winslow, *supra*, was a summary proceeding in equity by an assignee in bankruptcy (under the Act of 1843) for the possession of the property.

The bankrupts (cutlery manufacturers) had exe-

cuted a mortgage on their machinery, tools and implements, which contained a clause covering all that might be purchased within four years from date, and also all the stock manufactured and purchased during those four years.

Just before bankruptcy the mortgagee took possession of the property and sold it. The question related to the after-acquired property.

In holding that the mortgage of after-acquired property was good against the assignee, Judge STORY said, in part :

Page 644 :

“ It seems to me a clear result of all the authorities that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not ; or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily or with notice, or in bankruptcy.”

Pomeroy's definition of an equitable lien is as follows (*Equity Jurisprudence*, 3rd Ed., § 1235):

“ The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not

only of the original contractor but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice * * * The ultimate grounds and motives of this doctrine are explained in the preceding section ; but the doctrine itself is clearly an application of the maxim, *equity regards as done that which ought to be done.*"

This definition is expressly adopted as the law in *Ingersoll vs. Coram*, 211 U. S., 335, 368; *Walker vs. Brown*, 165 U. S., 654; *Howard vs. Delgado*, 121 Fed. Rep., 26, 30; *Goodnough Mercantile & Stock Co. vs. Galloway*, 156 Fed. Rep., 504; *Chattanooga Nat. Bank vs. Rome Iron Co.*, 102 Fed. Rep., 755; and many other cases.

POMEROY (*Equity Jurisprudence*, 3rd Ed) says :

S. 1234. Origin and rationale of the doctrine :

" If any reference to the theory of trusts is made, it is more accurate to describe these liens as analogous to trusts ; for while the two have some similar features, they are unlike in their essential elements.

When equity has jurisdiction to enforce rights and obligations growing out of an executory contract, this equitable theory of remedies cannot be carried out, unless the notion is admitted that the contract creates some right or interest in or over specific property, which the decree of the Court can lay hold of, and by means of which equitable relief can be made efficient. The doctrine of 'equitable liens' supplies this necessary element ; and it was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law. It follows, therefore, that in a large class of executory contracts, express and implied, which the law

regards as creating no property right nor interest analogous to property, but only a mere personal right and obligation, equity recognizes, *in addition to the personal obligation*, a peculiar right over the thing concerning which the contract deals, which it calls a 'lien,' and which, though not property, is analogous to property (quoted by BRADLEY, J., in *Elliott vs. Hovey*, 118 New York, 124) and by means of which the plaintiff is enabled to follow the identical thing, and to enforce the defendant's obligation by a remedy which operates directly upon that thing. The theory of equitable liens has its ultimate foundation, therefore, in contracts, express or implied, which either deal with or in some manner relate to specific property, such as a tract of land, particular chattels or securities, a certain fund, and the like."

Some of the many New York cases declaring and applying the doctrine of equitable lien are :

National Bank of Deposit vs. Rogers,
166 N. Y., 380 ;
Hamilton Trust Co. vs. Clemes, 163
N. Y., 423 ;
Hovey vs. Elliott, 118 N. Y., 124 ;
Coats vs. Donnell, 94 N. Y., 168 ;
Spring vs. Short, 90 N. Y., 538 ;
Husted vs. Ingraham, 75 N. Y., 251 ;
McCaffrey vs. Woodin, 65 N. Y., 459 ;
Parshall vs. Eggert, 54 N. Y., 18 ;
Bank of Rochester vs. Jones, 4 N. Y.,
497.

Let us suppose now that there had been no bankruptcy of the New York copartnership, and that on October 25, 1907, the demand of appellee for physical possession of the scrip had been denied, and appellee had brought a suit in equity against the New York copartnership to enforce its lien upon

the securities under its contract. *There can be no doubt whatever, under the authorities, that appellee would have obtained a decree enforcing its lien.*

The property was sufficiently identified under the agreement, to enable a court of equity to specifically enforce it. It was all in a secure package, set aside in a vault, marked with appellee's name as its property, carefully listed on the outside, entered in the New York copartnership books as having been deposited to secure appellee's obligation under its acceptances, and upon the faith of the agreement appellee was then actually liable upon its acceptances of the New York copartnership drafts, to the amount of £80,000.

The District Court below, whose decree has been reversed, had no doubt on this point. The learned Judge in his opinion, said (*R.*, 1093, 1094):

"Now it may be assumed that such an agreement was and is valid in equity *inter partes*."

Again (*R.*, 1093):

"It may be assumed, and I think correctly, that the original escrow agreements were good *inter partes*."

If this agreement is valid in equity *inter partes*, then it creates an equitable lien. An equitable lien by express contract is nothing more than an agreement for security on property enforceable in equity *inter partes*.

Equity confers only "specific remedies" (*Pomeroy*, § 1234, *supra*). It cannot act unless the property is specified.

To say that this contract could not on October 25, 1907, have been specifically enforced in a suit in equity *inter partes*, is contrary to justice and com-

mon sense, and neither the Master nor the learned District Judge below has expressed such a view. The Master is silent on the subject, the District Court below, as we have seen, has expressed the opinion that the contract is enforceable in equity, *inter partes*. And there can be no doubt whatever that it is so enforceable.

(c) PHYSICAL DELIVERY WAS NOT ESSENTIAL.

Physical delivery is impossible with property of this description.

Wilson vs. Little, supra.

Physical possession of certificates of stock is of no importance whatever in New York, except where a *bona fide* purchaser for value has arisen and then only where a case of estoppel by agency has been established.

Knox vs. Eden Musee, 148 N. Y., 441;

N. Y., N. H. & H. R. R. vs. Schuyler, 17 N. Y., 592; 34 N. Y., 30;

Moore vs. Met. Bank, 55 N. Y., 41;

Weaver vs. Barden, 49 N. Y., 286.

POMEROY says (*Eq. Juris*, § 1233, *supra*):

“It is of the very essence of this condition that while the lien continues the possession of the thing remains with the debtor or the person who holds the proprietary interest subject to the encumbrance.”

Judge STORY, in *Parker vs. Muggridge*, 2 Story, 334, says:

“Possession is by no means necessary to create an equitable lien. On the contrary, in equity and admiralty, liens exist alto-

gether independently of possession, as, for example, the lien of the vendor for the unpaid purchase money where he has conveyed the land; the lien of a bottomry holder, and the lien of a seaman on the ship for his wages."

See also

In re Nat. Cash Register Co., 174
Fed. Rep., 579, C. C. A., 3rd.

(d) THE BANKRUPTCY RULE STATED AND CONSIDERED.

Innumerable cases are found in the books where the right to have agreements for security, or inchoate liens of some description, enforced against an assignee or trustee in bankruptcy, has been involved. The correct rule which explains and differentiates the cases is stated by *Lowell on Bankruptcy 3rd Ed.*, page 66, § 86, as follows :

" *Promise to give security.* In this country, a promise to give security at some future, indefinite time, or when required, or a general covenant for further security, will not authorize the debtor to give, and the creditor to receive security under circumstances which would make it a preference. In other words, the general and indefinite promise is disregarded.

A *bona fide* engagement to convey specific property, amounting to an equitable lien will, however, be valid, and this is the test."

This Court has made the same distinction in the late case of *Page vs. Rogers*, 211 U. S., 575, 579; see also *Ingersoll vs. Coram*, *supra*.

The Master and the District Court below have misunderstood this rule and misapplied it. The

Circuit Court of Appeals applied it correctly in reversing the District Court.

Inasmuch as there is a difference of opinion in this case, as to what Lowell meant by a "general and indefinite promise" which "is disregarded," it is necessary to refer to the cases which he cited.

Arnold vs. Maynard, 2 Story, R., 349, 358, was a case of a "previous request or demand of the creditor, or the verbal promise of the debtor, when he contracted the debt, to give security upon request."

Graham vs. Stark, 3 Benedict, 520, 534, was a case of a verbal promise by the debtor, long before the securities were given, "to give security when required."

In *ex parte Ames*, 1 Lowell, 561, Judge LOWELL himself wrote the opinion. He says, at page 564:

"And with us it is perhaps not the law, as it is in England, that a *general promise* of security given at the time the debt is contracted, may be executed after the debtor has become insolvent" (citing *Arnold vs. Maynard*, *supra*, *Graham vs. Stark*, *supra*, and *Blodgett vs. Hildreth*, 11 Cush., 311). * * *

"I have not seen or known of any case which brings up the somewhat nicer question, argued here, *whether specific and definite security, unconditionally stipulated for in writing*, may be given after a lapse of time and a change of circumstances. This may depend on *whether the contract is one that a court of law or equity would enforce in invitum*; for I apprehend and have often decided subject to a correction that has not yet been made, that the assignee stands no better than the bankrupt in all matters of title, excepting where there is actual or constructive fraud."

Bank of Leavenworth vs. Hunt, 11 Wall., 391, was a case of an unfiled chattel mortgage where an

oral agreement was made by the debtor to deliver to the creditor an entire stock of goods covered by the mortgage, whenever the creditor should desire.

Brett vs. Carter, 2 *Lowell*, 458, and *Barron vs. Morris*, 14 *N. B. R.*, 371, were both cases involving the question whether a clause in a chattel mortgage permitting the mortgagor to "sport with the property" made the mortgage void.

Unfiled chattel mortgages unaccompanied by change of possession, or permitting the debtor too "sport with the property" until default, may be and usually are inconsistent with any agreement for present security. There is nothing of the sort in our agreement.

In *Lloyd vs. Strowbridge*, 16 *N. B. R.*, 197, the rule is stated as follows (p. 200):

"Whatever may be the law in England, it is settled in this country that a general promise, made at the time the debt is contracted, to give security *if required*, cannot be executed after the debtor has become insolvent" (citing cases).

Burdick vs. Jackson, 15 *N. B. R.*, 318, was a New York case. The opening language of the opinion by GILBERT, J. :

"One of the first principles of equity is that it looks upon things agreed to be done, as actually performed. Acting upon this principle, courts of equity in England and in this country have held, that an agreement based upon a valuable consideration to give a mortgage will be considered in equity as a mortgage. That doctrine has been acted upon so frequently and for so long a period of time that it may justly be regarded as forming a part of the law of the land (citing numerous cases). * * *

The plaintiff (assignee in bankruptcy) is not a *bona fide* purchaser, but stands in the

shoes of the bankrupt. He cannot, therefore, assert any better right than the bankrupt himself."

Held, that a parol agreement for a mortgage on real estate between the bankrupt and respondent's guardian, supported by good consideration, would be treated in equity as a mortgage, and where the mortgage was executed in pursuance of this parol agreement, just before bankruptcy, it was not a preference, and is valid as against the assignee.

Holmes vs. Winchester, 135 Mass., 299, held that a promise by a husband given over two years before, in consideration of release of dower by his wife, to convey to her certain real estate some time in the future, was not sufficient to prevent the actual conveyance from being a preference. The Court says (*p.* 303):

"An agreement to give future security is an executory contract and 'imposes no higher legal obligation upon the debtor than his promise of payment, involved in the contracting of the debt.' And his fulfillment of the one is equally open to objection as a preference as his fulfillment of the other (*Forbes vs. Howe*, 102 Mass., 427, 435; *Ex parte Ames*, 1 Lowell, 561)."

In our case there was no promise for security "when required" or "upon request." It surely was not a "general promise" to give security some time in the future. It related to specific property then set aside and always capable of identification. Our case does not present the question "whether specific and definite security, unconditionally stipulated for in writing, may be given after a lapse of time and a change of circumstances" (*ex parte Ames*, *supra*).

In our case the security was actually given on

June 30, 1903, when the property was set aside and the letter sent.

As early as February 17, 1903 (*R.*, 980) defendant served a notice in writing upon the New York copartnership which refers "to the question of your providing security for the drawing credit which you have with us, which has already been privately touched upon, and continues: "we propose to give you until the 30th of June of this year, by which date *the necessary securities should be set aside and a list sent us.*"

On June 30, 1903, the thing was actually done, not promised (*R.*, 938, 889, and *Master's Fourth Finding*, *R.*, 1005). The securities were set aside and the list was sent. The defendant on July 5th, 1903, acknowledges the receipt of the letter of June 30, 1903, as follows (*R.*, 889):

"We are in receipt of your favor of 30th ultimo, in which you advise us of the securities *you have laid aside as security for your long drawings on us.*"

No future act was contemplated to render this security effective. The securities were *immediately* endorsed, *immediately* set aside, *immediately* entered in the Loan book as hypothecated securities, and were then and always thereafter treated as the property of the Manchester house. The intent of the parties to give *present, bona fide* security for the drawing credit is unquestionable.

For four years and a half, in implicit reliance upon this contract, defendant extended the New York copartnership, a constant drawing credit varying from £60,000 to £120,000 (*R.*, 215-6).

The permission given by defendant to the New York copartnership to take securities in the package, whenever they could be sold to advantage, and to replace them by others of equal value (*R.*,

889), surely did not make the contract a future one.

There was, therefore, nothing future about the promise, nothing indefinite or general, as to the time or subject matter. It was a present agreement for security on specified property, then and at all times subsequently identified. There was a complete and absolute appropriation of this property at all times to the purposes of the security.

In *National Bank of Deposit vs. Rogers* (166 N. Y., 380), S. & Co. borrowed \$3,000 from plaintiff, giving a note which recited that they had deposited with plaintiff as collateral security certain merchandise, S. & Co. at the same time gave plaintiff a paper whereby they acknowledged receipt of the merchandise from plaintiff and agreed to hold the goods in trust for plaintiff, to give them the proceeds in case of sale, and authorized plaintiff to cancel the trust at any time and take possession of the goods or the proceeds. *The fact was, that the goods were never delivered to plaintiff.* They were in the Custom House. Plaintiff was shown bills of lading, which were immediately returned. *No freight receipt, bill of lading or other similar document was issued to plaintiff or surrendered to it.* S. & Co. took possession of the goods and subsequently assigned them to the defendant upon consideration of antecedent debts and as trustee to pay from the assigned property debts to himself and others. The Court of Appeals held, LANDON, J., writing:

“ Their (S. & Co.) title and possession were thus complete and their duty was thenceforth to hold the goods precisely as if they had first deposited them with the plaintiff and the plaintiff had delivered them back under the terms of the surety agreement. This is what both parties intended should be done, what the surety agreements were intended to cover,

the moment S. & Co. should obtain the goods. The parties treated that as done which ought to have been done, and might have been done, and as S. & Co. thereby obtained from the plaintiff \$3,000, it is clear that equity and good conscience required them to treat it as done the moment the goods came into their hands, and continue so to treat it until the plaintiff should be reimbursed. * * *

As between themselves it was competent to show what occurred, and equity will do just what the parties themselves did, namely, treat that as done which ought to have been done. Thus, when S. & Co. obtained possession of the goods, plaintiff held their contract which characterized their possession as in trust for plaintiff's security, and equity requires that such characterization shall be taken as true, to the end that the security both parties agreed upon and intended shall not fail. Effect can be given to the intention of the parties by holding S. & Co. strictly to the letter of their contract. *Nathaniel P. Rogers, their assignee, upon consideration of antecedent debts and as their trustee to pay from the assigned property debts to himself and to others, stood in their shoes and thus had no intervening equities against the plaintiff.*"

(e) POSSESSION TAKEN EVEN OF GOODS AND CHATTELS, UNDER A CONTRACT FOR SECURITY, RELATES BACK SO AS TO CUT OFF ALL EXCEPT CREDITORS WHO HAD INTERVENED BY EXECUTION OR ATTACHMENT AND BONA FIDE PURCHASERS.

The possession so taken gives a title or rights enforceable in a Court of Law.

In *Parshall vs. Eggert* (54 N. Y., 18), R borrowed money from plaintiff, giving a note to which was attached a receipt stating "Received in store for the account of P. & S. subject to their order,

the following named property, as security to my note (stating amount)." The note matured. Plaintiff never took possession of the property in defendant's store until after defendant had become insolvent and had absconded. He then went to R's store, showed the receipt and took the keys, locking the store. Later the same day a Sheriff broke open the door and levied on the goods by virtue of an attachment obtained by H, a general creditor.

In an action at law against the Sheriff *for conversion of the property*, the Commission of Appeals held that the receipt was a *declaration that R held the property as security for the notes given to plaintiff*. Had the property in question been delivered to the plaintiff, it would have created a valid pledge. The Court said :

"I know of no authority denying the right of a party who has a contract for a pledge ineffectual for want of delivery, to obtain a delivery at a subsequent time, and thus to validate the pledge. Upon general principle, the only obstacle which can prevent such a transaction from being effectual must be the intervention of fraud. Certainly there is no rule of law which requires a pledge in writing to be filed as a chattel mortgage; nor is it consonant with any rules for the construction of statutes to borrow such a requirement as to pledges from the positive provisions which, when enacted, were introductive of a new rule, and which declared unfilled chattel mortgages absolutely void as against creditors; nor is there any warrant for saying that because a chattel mortgage unfilled could not afterward be filed with the effect to cut off the right of an intermediate creditor to avoid it as under the statute as conclusively fraudulent, therefore, a pledge of undelivered goods cannot be made effectual against an intermediate creditor by delivery, in the absence of fraud. Though a contract

of pledge should be regarded, when unaccompanied by delivery, as within the other provisions of the statutes in regard to fraudulent conveyances and contracts as to personal property, the question of fraud then arising would be a question of fact upon which the party would have a right to go to the jury. In the absence of any intermediate right, the parties could perfect a written contract or pledge by subsequent delivery. Even between successive pledgees, without any communication with each other, that one who lawfully obtains possession, at the time of the pledge or subsequently, is entitled to be preferred. * * *

A creditor who acquires a specific right to or lien on the thing pledged may prevent the pledgee's interest in an undelivered chattel from attaching. But such is not the condition of the creditor at large. The only ground on which he can claim to prevent the perfecting of such a right in the pledgee is that it works a fraud upon him. The transaction is not one which any statute calls fraudulent in itself, and its validity ought, therefore, to go to a jury."

Parshall vs. Eggert, supra, was cited and approved in *Nat. Bank of Deposit vs. Rogers, supra*.

The same doctrine has been repeatedly declared by this Court.

Hausell vs. Harrison, 105 U. S., 401;

Thompson vs. Fairbanks, 196 U. S., 516;

Humphrey vs. Tatman, 198 U. S., 91.

And by other courts

Godwin vs. Murchison Nat. Bank,
145 North C., 320;

Fisher vs. Zollinger, 149 Fed. Rep.,
54, C. C. A. 6th, LURTON, J.;

Union Trust Co. vs. Bulkley, 150
Fed. Rep., 510, C. C. A. 6th;
Bank vs. Penn. Trust Co., 124 *Fed.*
Rep., 968, C. C. A. 3rd.

It is true that in some cases the possession taken just before bankruptcy has been held not to relate back, but these are cases where the original contract was either (1) fraudulent in law and hence void as against general creditors (*Zarlman vs. Bank*, 189 N. Y., 267, 273; *Security Warehouse Co. vs. Hand*, 206 U. S., 415), or (2) made void as against general creditors by local statute (*Skilton vs. Codrington*, 185 N. Y., 80), or (3) was a mere general and indefinite promise, under Lowell's definition (*Lowell on Bankruptcy*, § 86, *supra*), and hence insufficient to create an equitable or inchoate lien (*In re Great Western Mfg. Co.*, 152 *Fed. Rep.*, 123; *Ryttenberg vs. Schefer*, 131 *Fed. Rep.*, 313).

It is absolutely clear that possession so taken under a contract for a pledge of goods and chattels would be good against the trustee in bankruptcy.

Parshall vs. Eggert, *supra*.

Humphrey vs. Tatman, *supra*.

In *Hauselt vs. Harrison*, 105 U. S., 401, the agreement was:

"And it is further agreed that all the skins, whether green, in process of tanning, tanned, or tanned and finished, shall be considered as security, etc., for the advances."

The following language from Mr. Justice MATTHEWS in the last cited case is very applicable to our case:

"It was decided in *Gregory vs. Morris* (96 U. S., 619) that the legal effect of such a contract is to create a charge upon the property, not in the nature of a pledge but of a

mortgage. Such a lien is good between the parties, without a change of possession, even though void against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by delivery of possession, before the rights of third persons have intervened, it is good absolutely."

It was held, *in an action at law*, that possession taken under this agreement, immediately before bankruptcy and in contemplation thereof, was good against the assignee in bankruptcy.

In *Wood vs. U. S. Fid. & Guar. Co.*, 143 Fed. Rep., 424, the contract between a building contractor and his surety contained this clause :

" We do further agree in the event of our being unable to complete or carry on the aforesaid contract, to assign, and we do hereby assign, such plant as we may own or have upon said work, to the United States Fidelity & Guaranty Company."

Held, that possession taken under the agreement just prior to bankruptcy, was good against the trustee in bankruptcy.

It is clearly established by all of the authorities that where the contract is a present agreement for security on specified property, possession taken under it relates back to cut off all, except creditors who have intervened by execution or attachment and *bona fide* purchasers for value.

(f) AN EQUITABLE LIEN UNDER THE LAW OF NEW YORK IS ALWAYS PREFERRED OVER GENERAL CREDITORS, SUBSEQUENT JUDGMENT CREDITORS, MECHANICS' LIENORS AND EVERYONE EXCEPT PURCHASERS FOR VALUE.

Here again, to understand the cases, the distinc-

tion between an action at law and a suit in equity must be kept in mind.

In *Rochester Distilling Co. vs. Rasey*, 142 N. Y., 579, GRAY, J., said :

"This action being one at law, the inquiry is limited to ascertaining the strictly legal rights of the two contending creditors to the property of their debtor, Powell, in the crops which he had raised."

In the above case the Sheriff had made a levy in execution and the action was a possessory action at common law and the rights of the parties were determined by the common law. At law there must be a "*novus actus interveniens*," referred to in Lord Bacon's famous maxim. In equity, the rule is more favorable to the equitable lienor. The title is good without the new intervening act, and the lien attaches the moment the property comes into existence (see Lord CHELMSFORD'S opinion in *Holroyd vs. Marshall*, *supra*; *McCaffrey vs. Woodin*, *supra*).

From the numerous New York cases which establish our proposition, we select only one quotation. In *American Sugar Refining Co. vs. Fan-cher*, 145 N. Y., 552, the equitable lien of an unpaid vendor under a fraudulent sales contract, upon the proceeds of sub-sales of the merchandise, was enforced against a general assignee for the benefit of creditors, into whose hands the proceeds had come. ANDREWS, C. J., said:

"But general creditors have no equity or right to have appropriated to the payment of their debts the property of the plaintiff, or property to which it was equitably entitled as between it and Burkhalter & Co. They, so far as it appears, advanced nothing and gave no credit on the faith of the firm's pos-

session of the sugars, assuming that that element would have had any bearing on the case."

See also:

In the Matter of Howe, 1 Paige, 125,
and cases cited;

Payne vs. Wilson, 74 N. Y., 348;

Hamilton Trust Co. vs. Clemes, 163
N. Y., 423;

National Bank of Deposit vs. Rogers,
166 N. Y., 380.

(g) THE LOCAL LAW GOVERNS.

It is clear from the authorities above cited that the transaction infringed no statute of New York, and that the agreement was valid *inter partes*, and as against general creditors under the local law. Therefore, it must be upheld against the Trustee.

Hiscock vs. Varick Bank, 206 U. S.,
28, 38 ;

Thompson vs. Fairbanks, 196 U. S.,
516 ;

Humphrey vs. Tatman, 198 U. S.,
91 ;

Bryant vs. Swofford, 214 U. S., 279,
290.

SUMMARY OF POINT I.

The contract under which the drafts were accepted was a present contract for security on specified property and *either* passed the general property in the securities to the appellee, in which case no further argument is necessary, or created an equitable lien enforceable *inter partes*.

If the lien was inchoate prior to October 25, 1907,

it was enforceable in a court of equity before that day and would have been preferred over everyone except *bona fide* purchasers for value without notice. The possession taken on October 25, 1907, merely ripened and perfected this inchoate lien, if it was inchoate, into a common law possessory lien, enforceable in an action at law, and the possession related back so as to cut off everyone except creditors who had intervened by execution or attachment, and *bona fide* purchasers. There were no purchasers, and the (now) bankrupts had never even defaulted in a payment prior to October 30, 1907, so there were no intervening rights of attachment or execution creditors. The agreement and the transactions under it were valid under the local law of New York and must be upheld here.

II.

The subsequent intervention of bankruptcy could not defeat appellees' right to the securities.

(a) THE TRUSTEE DOES NOT HAVE THE RIGHTS OF ATTACHMENT OR EXECUTION CREDITORS.

We discuss this point because decisions thereon of at least four Circuit Courts of Appeal have recently been overruled by this Court, and because we contend that even if possession had not been taken on October 25, 1907, we could have enforced our equitable lien under the contract against the trustee.

Loveland on Bankruptcy, 3rd Edition, at pages 438 and 450, refers at length to the erroneous de-

cisions of many lower Courts, including four Circuit Courts of Appeal which were overruled by *York Mfg. Co. vs. Cassell*, 201 U. S., 344.

In this last case the Court declared the law as follows:

“Under the provisions of the Bankrupt Act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belongs to the bankrupt at the time when the trustee's title accrued. * * * The trustee under such circumstances stands simply in the shoes of the bankrupt and as between them he has no greater right than the bankrupt. This is held in *Hewit vs. Berlin Machine Works*, 194 U. S., 296. The same view was held in *Thompson vs. Fairbanks*, 196 U. S., 516. It was there stated that ‘under the present Bankrupt Act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt’ (see *Yeatman vs. Savings Institution*, 95 U. S., 764; *Stewart vs. Platt*, 101 U. S., 731; *Hausell vs. Harrison*, 105 U. S., 401). The same doctrine was reaffirmed in *Humphrey vs. Tatman*, 198 U. S., 91.”

In *Hurley vs. Atchison, Topeka & Santa Fe Ry.*, 213 U. S., 126, 132, Mr. Justice BREWER quotes with approval the following language of Judge PUTNAM from *In re Chase*, 59 C. C. A., 629, 631:

“It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity

as against an ordinary litigant (*Williams' Law of Bankruptcy*, 7th Ed., 191). Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the Court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

In our case the bankrupts had received \$384,000 as the proceeds of drafts accepted by the Manchester house just before bankruptcy, under the express agreement that it should be secured by the property set aside. The Manchester house is left to pay these drafts and the trustee seeks to compel it to surrender the security. *Such a demand by the bankrupts would have been preposterous.* It is difficult to understand how the trustee is in any better position.

The trustee in this case stands in the shoes of the New York copartnership. He has no greater rights than the New York firm could have asserted against the appellees. There was no judgment creditor of the bankrupt, and no levy in execution or attachment.

(b) THE TAKING POSSESSION ON OCTOBER 25, 1907,
WAS NOT A PREFERENCE.

In *Sawyer vs. Turpin*, 91 U. S., 114, a chattel mortgage recorded just prior to bankruptcy was given in exchange for an unrecorded bill of sale of personal property. The bill of sale was unaccompanied by change of possession and was of such a character that it probably could not have been recorded. The bill of sale, however, was good between the parties, and no creditor had intervened. Judge STRONG, writing the opinion, said:

"It is too well settled to require discussion,

that an exchange of securities within the four months is not a fraudulent preference within the meaning of the Bankrupt Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it (Citing *Cook vs. Tullis*, 18 Wall., 340; *Clark vs. Iselin*, 21 id., 260; *Watson vs. Taylor*, 21 id., 378, and *Burnhisel vs. Firman*, 22 id., 170).

It follows that the mortgage of July 31st was not prohibited by the Bankrupt Act when it was given, and that it was valid. Hence, as it was recorded on the 17th day of September, 1859, pursuant to the requisitions of the State law, before any rights of the assignees in bankruptcy accrued, it cannot be impeached by them.

It has been argued, however, on behalf of the assignees, that the bill of sale of May 15th was an insufficient consideration for the mortgage, because, as alleged, there was an agreement between Bacheller and Turpin that it should not be recorded, and should be kept secret. If the fact were as alleged it is not perceived that it would be of any importance; for it is undeniable that the bill of sale rested on a valuable consideration—to wit, the debt of \$27,839 gold, due to Novelli & Co.; and it is not denied that it gave to Turpin the right to take possession of the property described in it. It was, therefore, a valuable security, even if there was an agreement not to record it. If it be said failure to put it on record enabled the debtor to maintain a credit which he ought not to have enjoyed, the answer is that the Bankrupt Act was not intended to prevent false credits. Its purpose is ratable distribution. But the evidence does not justify the assertion that there was in fact any agreement that the bill of sale should not be recorded, or that possession should not be taken under it."

In *Humphrey vs. Tatman*, 198 U. S., at page 94, Mr. Justice HOLMES, writing the opinion, said of *Sawyer vs. Turpin*, *supra*, that it is

“a case like the present, decided as we decide this, and cited by the Court below.”

Humphrey vs. Tatman, *supra*, reverses *Tatman vs. Humphrey*, 184 Mass., 361, on the authority of *Thompson vs. Fairbanks*, 196 U. S., 516.

The defendant in the *Tatman* case had taken possession of the bankrupt's entire stock of jewelry about three weeks before bankruptcy, claiming it under an unrecorded chattel mortgage executed about two years earlier when the bankrupt was solvent. Under the Massachusetts statute an unrecorded mortgage “was not valid against any other person than the parties thereto.”

The Massachusetts Supreme Court said :

“The defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third persons had acquired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in insolvency under the statutes of this Commonwealth, or against an assignee in bankruptcy, under the United States Bankruptcy Act of 1867 (*Folsom vs. Clemens*, 111 Mass., 273; *Chase vs. Denny*, 130 Mass., 566; *Blanchard vs. Cooke*, 144 Mass., 207; *Bennett vs. Bailey*, 150 Mass., 257; *Bliss vs. Crosier*, 159 Mass., 498; *Haskell vs. Merrill*, 179 Mass., 120; *Gibson vs. Warden*, 14 Wall., 244; *Sawyer vs. Turpin*, 91, U. S., 114).

The Court then discussed the provisions of the Act of 1898 which differed in regard to preferences and acts of bankruptcy from the Act of 1867.

“In view of these several provisions and

the language of Sections 60a and 60b, and the construction put upon the statute by the Supreme Court of the United States, we are of the opinion that, in the case of a preference by way of an unrecorded chattel mortgage, the transfer dates, under the Bankruptcy Act of 1898 and the Amendatory Act of February 5, 1903, from the acquisition of possession under the mortgage.

In *Matthews vs. Hardt*, 79 App. Div., (N. Y.), 570 (9 Am. B. R., 373), the Appellate Division of the Supreme Court of New York, in a well-considered opinion, made a decision which entirely covers the present case."

In reversing the Massachusetts Supreme Court, this Court (Mr. Justice HOLMES writing) said :

"The question then is one of Massachusetts Law." * * *

"As the Supreme Court of Massachusetts says that taking possession under the mortgage within four months would be valid as against the trustee in bankruptcy but for supposed peculiarities of the present bankruptcy law, and as *Thompson vs. Fairbanks*, 196 U. S., 516, although distinguishable from the present case, decides that it is valid under the present bankruptcy law if good by the laws of the State, it follows that the mortgagee was entitled to keep his goods and that the judgment against him was wrong."

It is clear that *Matthews vs. Hardt*, 79 N. Y. App. Div., 570, was overruled on the same point by *Humphrey vs. Tatman*, *supra*.

In short, the recent decisions of this Court have overruled two prevalent theories in regard to the present Bankrupt Act ; (1) that the trustee has any greater title than the bankrupt or can ordinarily enforce any rights other than those of *simple contract creditors* ; (2) that there are any "peculiar provi-

sions" of the present act which invalidate a lien or title which is good under the local law against the bankrupt and his general creditors.

It must be conceded that if appellee on October 25, 1907, had a contract right to have the securities held as security for its obligation upon the acceptances, then the possession taken on that day could not have been a preference.

To find a preference, the Court must declare that the contract under which the drafts were accepted was a nullity. It is conceded, however, that it was a valid contract enforceable in equity *inter partes*. The possession taken on October 25, 1907, could not, therefore, have been a preference.

III.

The bankrupt's general creditors had no property right in the securities and appellees' contract was enforceable as against creditors.

(a) IT IS A CASE UNAFFECTED BY FRAUD.

Judge WARD, writing for the Circuit Court of Appeals below, said :

"As the transaction was a perfectly honest one, a construction should be adopted to give it effect, if that is possible."

Judge NOYES, writing the concurring opinion in the same Court, said :

"In considering the case from any point of view, one thing is apparent from the outset, and that is the good faith of the parties."

The Master and the District Judge did not question the absolute good faith and honest intent of the parties, and we assume that it is quite unnecessary to dwell further upon the point.

The only question is whether the possession taken on October 25, 1907, by the defendant was a voidable preference under Section 60 of the Bankrupt Act.

(b) THERE WAS NO ESTOPPEL.

Security was the only object of the agreement.

The debtor derived no benefit or advantage by retaining physical control.

Everything that was done or intended could have been accomplished as well if the securities had been delivered in escrow to a third person. They were just as much removed from the working assets as if they had been handed to appellee.

There was no agreement for beneficial use. The debtors were not permitted "to sport with the property" (Chancellor KENT's phrase). Nor did they.

At the time of taking out they must put in securities of equal or greater value. This was done. The value of the deposit was never depleted.

The securities were all American stocks, bonds, notes and deeds, and must of necessity remain here, while appellee resided in England. Appellee was willing to trust the debtors to perform this agreement and to hold the securities strictly for appellee's account as its property. This trust was never once violated during the four and one-half years of the agreement. It was a complete and absolute *appropriation* of specific property by the debtors as security for the obligation.

Had the debtors attempted to violate the contract or deplete the security, they would have immedi-

ately lost the benefit of the contract, which was continuing. Appellee would have refused to accept more drafts and could have compelled the delivery of the securities either to them or to some officer of the court to be held for their benefit. All changes, according to the agreement, were immediately reported, noted and, if satisfactory, accepted by defendant.

No false credit was made possible by the agreement.

The debtors were not merchants. The property was not chattels. The debtors were not ordinary bankers. They were foreign bankers. The great volume of their business was buying and selling foreign exchange. They sometimes purchased foreign bills here for cash and then drew against them. They also had constant drawing credits with numerous foreign houses. Practically all of these foreign drawing credits were secured by the deposit of collateral. Their profit was in the saving of interest and in the difference of the rates of exchange.

In this country the debtors were lenders and purchasers for cash, not borrowers.

They did not seek credit, except secured credit, with foreign houses. Consequently, practically their entire capital was pledged to foreign houses to secure drawing credits. There was no secret about this. It is the condition of every "foreign banker" when exchange business is good.

The shrinkage in value of these pledged securities caused their failure.

The debtors never attempted to repledge or to sell appellees' securities. Had they done this a *bona fide* purchaser for value without notice might have arisen. In this case there is not even a judgment creditor nor a levy in attachment. The se-

curities were never sold nor repledged while they remained in the "escrow." The debtors, down to the time of bankruptcy, met all of their obligations as they fell due. Nobody purchased, no one obtained a judgment and no one levied.

Nobody who dealt with these debtors knew or could have known, or cared, whether the securities set aside were validly pledged or not. No one dealt with the debtors, in reliance upon their ownership of these securities, or even knew of the physical possession of the package by the debtors. The debtors were not permitted to, nor did they in any manner "sport with the property."

A valid pledge of securities is usually secret.

In *Stackhouse vs. Holden*, 66 N. Y. App. Div., 426, Mr. Justice NASH remarked:

"Every pledge of securities may be and generally is done in secret. The dealings had with mercantile houses are always with knowledge that available bills and accounts receivable may be so used to procure credit or capital."

Much more is it true that persons dealing with these foreign bankers know that their securities probably are pledged for foreign drawing credits. No reliance was placed upon any visible ownership. No one was misled in giving credit. The books of account were correctly kept and showed that these securities had been deposited to secure the drawing credit which defendant accorded.

(c) THE LAW AS TO CHATTELS DOES NOT APPLY.

The distinction between incorporeal personalty and "goods and chattels" is important in this case and has already been dwelt upon above.

It is clearly established by the New York au-

thorities (discussed at length *infra* under Point V) that a general creditor cannot attack a legal or equitable assignment of property of this character where there is no actual fraud.

Niles vs. Mathusa, 162 N. Y., 546;
McNeeley vs. Welz, 166 N. Y., 124;
Central Trust Co. vs. West India
Imp. Co., 169 N. Y., 314;
Young vs. Upson, 115 Fed. Rep., 192.

(d) THE NEW YORK CASES.

We have already referred to these under Point I of this brief. It is clear that in the absence of fraud, or statutory inhibition, general creditors have no rights whatever in the debtor's property or to set aside a transfer. It must be conceded that there was an entire absence of fraud in our case and that there is no statutory inhibition which makes our contract void as against general creditors. It is difficult to understand from what source the trustee would acquire a right to attack this transfer. Neither the bankrupt nor its general creditors had such a right. The trustee stands in the shoes of the bankrupt. He can ordinarily enforce only the rights of general creditors.

The appellant, in the last analysis, must take one of two positions. He must assert that the contract created no right in the appellees to the securities either (1) because it was too indefinite to be enforceable *inter partes* by a court of equity; or (2) because it was fraudulent in law and hence void against general creditors.

Both of these contentions are untenable. The contract is concededly enforceable in equity, *inter partes*, and we show, *supra* (Point IIIc) and *infra* (Point V) that this contract is not fraudulent in law.

IV.

The Circuit Court of Appeals was right in reversing the decree of the District Court.

The opinion of the learned District Judge below having been wholly based upon the hypothesis that the agreement was only

“an agreement to validly and lawfully pledge certain property on demand,”

both Judge WARD and Judge NOYES, writing for the Circuit Court of Appeals (Judge LACOMBE concurring, for reasons stated in Judge NOYES' opinion), examine closely this hypothesis and discard it.

As Judge WARD says (*R.*, 1135):

“The intention to secure is plain, but this could have been accomplished not only by a pledge, which is the usual course of business in case of choses in action, but by a mortgage or trust. * * * As the transaction was a perfectly honest one, a construction should be adopted to give it effect, if that is possible.”

He then points out that if the transaction be regarded as a mortgage, it was undoubtedly valid against the trustee in bankruptcy under the law of New York.

He also points out how astute the New York Courts have been to carry out the intention of the parties, in the trust receipt cases cited under Point I of our brief.

He concludes that the transaction was a declara-

tion of trust, and that the New York copartnership, in delivering the securities just prior to bankruptcy, only did what a court of equity would have compelled it to do. He says :

“No new right or privilege was then created voidable under the Bankrupt Act. The delivery of these earmarked securities was in strict pursuance of the agreement made long before on the strength of which the credit was given. *Sabin vs. Camp*, 98 *F. R.*, 974, cited with approval in *Thompson vs. Fairbanks*, 196 *U. S.*, 516, 524. A liberal construction should be given to these transactions in aid of the obvious intention of the parties.”

Judge NOYES (Judge LACOMBE concurring) differs from the conclusion of Judge WARD that the transaction was a declaration of trust, while concurring with him in the result (*R.*, 1138).

He emphasizes the absolute good faith of the parties.

He then distinguishes between a mortgage and a pledge, and points out the peculiarity of a pledge of choses in action.

After referring to the fact that the securities were endorsed for transfer, before being set aside, he says (*R.*, 1141) :

“But the equities of the case coupled with what the parties did—aside from any technicality—make out a strong case in support of an equitable lien in the nature of a mortgage upon the security in favor of the Manchester house, valid against the trustee in bankruptcy without a change in possession.”

Again (*R.*, 1141):

“Now, there being no fraud in the transaction and no rights of purchasers or attach-

ing creditors having intervened, the taking possession of the securities by the Manchester house before the bankruptcy, was, in the absence of a statute making it unlawful, entirely legal and proper. Regarded simply as a pledge, the pledgee had the right to take possession" (citing *Parshall vs. Eggert*, 54 N. Y., 18).

Judge NOYES inclines strongly to the opinion that the original transaction was a mortgage. (*R.*, 1140).

Judge NOYES apparently rests his decision, however, upon two very safe grounds, as follows (*R.*, 1144):

"It is my opinion that possession was taken pursuant to a pre-existing right and that equitable principles support such right. I think that this is in no aspect a case of the bald creation of a lien within four months of bankruptcy.

Finally, I think it a serious question whether a mortgagee or pledgee taking possession of property in pursuance and in the enforcement of a pre-existing right of long standing can properly be said to have reasonable cause to believe that the mortgagor in surrendering possession is intending to give him a preference."

The error of the learned District Judge below is indicated by the following quotation from his opinion:

"What, then, does 'equitable lien' mean as applied to this transaction? Nothing more than an endeavor to enforce an agreement for a pledge, unaccompanied by any contemporaneous transfer of possession. In my opinion no such equitable lien does or can exist; it would be a contradiction in terms, and amount to a most inequitable infraction of the law of pledge (*Buffalo G. I. Co. vs. Third National Bank*, 162 N. Y.,

163 ; *Wilson vs. Little*, 2 N. Y., 446 ;
Security Warehouse Co. vs. Hand, 206
 U. S., 415.)"

His error seems to us to rest in the assertion that equity follows the law of pledge. An equitable lien is not in the nature of a pledge. It is in the nature of a mortgage.

Pomeroy Eq. Juris, §§ 1233, 1234 ;
Hausell vs. Harrison, 105 U. S., 401.

Equity enforces the contract, not the pledge. A contract for a pledge, ineffective for want of delivery under it, is not void against creditors.

Parshall vs. Eggert, *supra* ;
National Bank of Deposit vs. Rogers,
supra ;
Hausell vs. Harrison, *supra*.

A mortgage which was neither acknowledged nor witnessed nor recorded and hence invalid by statute, was given in *Payne vs. Wilson*, 74 N. Y., 348. The contract, however, was enforced as an equitable lien valid as against subsequent mechanics' lienors and judgment creditors.

The learned District Judge, after erroneously characterizing our contract as a contract to validly and lawfully pledge certain property on demand, says (*R.*, 1093-4):

"Now it may be assumed that such agreement was and is valid in equity *inter partes*; but equity will not enforce it, as against the rights of other creditors as represented by a trustee in bankruptcy. This I believe to be the law of New York, as disclosed in *Zartman vs. First National Bank*, 189 N. Y., 273."

Judge NOYES, in the Circuit Court of Appeals, said (*R.*, 1144):

“The case of *Zartman vs. First National Bank*, 189 N. Y., 273, relied upon by the appellee (now appellant) as his principal case upon this point, is not in conflict with these views. In that case there was merely a contract to give a mortgage upon after-acquired property. There was no lien which could have been enlarged or perfected by taking possession.”

A careful reading of the opinions in both Courts below reduces the case to this one issue, viz.:

Whether the contract of June 30th, 1903, was a mere promise to give security upon demand or if required, and hence not enforceable, as the learned District Judge apparently held, or whether, as Judge NOYES stated, the taking of possession on October 25, 1907, was:

“The exercise of a pre-existing right well founded in equity” and therefore “not a preference although occurring within the prescribed period” (*R.*, 1143).

The District Court erred and the Circuit Court of Appeals properly reversed its decree, because

1. It is only in cases of fraud or express statutory inhibition that the rights of general creditors may be said to intervene in equity.

Parshall vs. Eggert, 54 N. Y., 18;

Payne vs. Wilson, 74 N. Y., 348;

McCaffrey vs. Woodin, 65 N. Y., 459;

American Sugar Refining Co. vs. Faucher, 145 N. Y., 552;

Niles vs. Mathusa, 162 N. Y., 546.

Hamilton Trust Co. vs. Clemes, 163 N. Y., 423;

National Bank of Deposit vs. Rogers,
 166 N. Y., 380;
Hausell vs. Harrison, 105 U. S.,
 401;
Thompson vs. Fairbanks, 196 U. S.,
 516;
Humphrey vs. Talman, 198 U. S., 91;
York Mfg. Co. vs. Cassell, 201 U. S.,
 344.

2. It is not necessary (as the learned District Judge infers, *R. 1093*), that appellees' title should have been enforceable in an action at law four months before bankruptcy. Nor was the test whether the appellees could have then maintained an action of replevin.

The cases last cited all show this. The case of *National Bank of Deposit vs. Rogers*, *supra*, affords a striking instance to the contrary, because the plaintiff in that case first brought an action at law and the complaint was dismissed. The plaintiff then brought a suit in equity, and its equitable lien arising from the express contract for security was enforced against the assignee for the benefit of judgment creditors.

3. The statement of the learned District Judge, that the property was not sufficiently identified to create an equitable lien (*R. 1092*) is hopelessly inconsistent with his later statement that the agreement was and is valid in equity *inter partes* (*R. 1093-4*).

Pomeroy Eq. Juris., § 1234.

4. The enforcement of an equitable lien will not be denied because it is an infraction of the law of pledge. The District Court's contrary holding is fundamental error.

This contention is discussed and its fallacy

pointed out in *Goodnough Mercantile & Stock Co. vs. Galloway*, 156 Fed. Rep., 504, and cases cited.

We had an enforceable contract for present security. If there was a valid pledge, resort to a court of equity to enforce the contract for security was clearly unnecessary. All common law liens are possessory. A common law mortgage is strictly a conveyance, not a lien. Hence, as this Court said in *Hauselt vs. Harrison* (*supra*), an equitable lien is in the nature of a mortgage, not of a pledge. The contract, which can be specifically enforced, takes the place of the conveyance or mortgage, unless, as we also contend, there was a valid common law mortgage of the property. The Circuit Court of Appeals below, goes very far towards sustaining the latter contention.

5. Appellees have a valid legal title against which the trustee cannot prevail. This legal title is not a voidable preference because it was exchanged for an equally valid equitable title.

Sawyer vs. Turpin, 91 U. S., 114;

Humphrey vs. Tatman, 198 U. S., 91.

6. Our contract was neither *malum in se* nor *malum prohibitum*. It was a *bona fide* present contract for security upon specified appropriated property. Its sole object was security. It was not calculated to defraud and, as Judge WARD said, it never did defraud or mislead anybody. It was not void by statute.

7. Under the New York law, such a contract concededly being enforceable in equity *inter partes*, it was enforceable against the trustee in bankruptcy, who only represented the bankrupts and their general creditors. The contract was not void against general creditors.

Humphrey vs. Tatman, *supra*.

We have attempted, under this Point, to indicate briefly the fundamental errors underlying the decision of the District Court, which called for a reversal of its decree. We have cited throughout our brief the numerous decisions of the New York Courts, as to the local law, and of this Court, upon the question of a voidable preference, showing that the decree of the Circuit Court of Appeals should be affirmed.

V.

The authorities relied upon by appellant are not applicable.

These cases are :

Zartman vs. First Nat. Bank, 189
N. Y., 267;
Casey vs. Cavaroc, 96 U. S., 467;
In re Great Western Mfg. Co., 152
Fed. Rep., 123.

The *Zartman* case and *N. Y. Security & Trust Co., vs. Saratoga Gas & Elect. Light Co.*, 159 N. Y., 137, are cases which belong to a different class from ours. Both construed clauses in corporation mortgages, given to secure bond issues, which purported to cover all after-acquired property and provided that as to the shifting stock and material (in the one case) and as to the earnings (in the other) *the mortgagor should until default remain in possession with the full beneficial use and enjoyment thereof.*

These clauses of the mortgages were fraudulent in law, under the doctrine of *Southard vs. Benner*,

72 N. Y., 424. Furthermore, as to the property in question, they are so utterly inconsistent with any lien or any present agreement for a lien, that the Court says they are a nullity. The agreements as to such after acquired property were in substance to give a lien after default upon such property as might by chance belong to the mortgagors at that time. They were so general and indefinite that they will be disregarded (*Lowell on Bankruptcy*, § 86, *supra*). The lien was not to attach, according to the agreements, until possession was taken at some future time, and the agreements did not specify any property to which it was to attach, other than such property of the description as the mortgagor might then have. The *Zartman* case is clearly distinguished from the present case by Judge NOYES in the opinion of the Circuit Court of Appeals.

Our agreement was essentially different from this. In the first place, it was not fraudulent in law, for it did not give the debtor beneficial use of the property. Its object was security and nothing else. The debtor could remove property from the package only by replacing it with other property of equal or greater value, and the value of the security could not be depleted. In the second place, our securities were set aside and held for the account of defendant as security for its obligation upon its acceptances. It was not an agreement for a lien at some future, indefinite time, but an agreement for *present* security. Nothing whatever was said about the defendant taking possession at some future time. The parties regarded the transaction as having effectually created security on property which was set aside and clearly specified. To hold otherwise is to construe the entire contract as meaning nothing, whereas the letters show clearly that the parties intended present security. In the *Zart-*

man case and the *N. Y. Security & Trust Co.* case, only a relatively insignificant part of the mortgages was held void, viz., that which related to shifting stock and materials and earnings. In our case, the District Court's denial that the parties intended any present security whatever, is palpably inconsistent with the plain language of the agreement and with the whole course of dealings between the parties and that Court was properly reversed by the Circuit Court of Appeals.

The following language of the opinion in the *Zartman* case, however, is contrary to the construction of the Bankrupt Act by this Court in *York Mfg. Co. vs. Cassell*, *supra*:

"The plaintiff, as trustee in bankruptcy of the mortgagor, has the same rights as a creditor armed with an attachment or execution (*Skilton vs. Codrington*, *supra*; *In re Werner*, 5 Dill., 119; *In re Garcewich*, 8 Am. Bank Rep., 149; *U. S. Bankruptcy Act of 1898*, Section 70)."

If this language is to be taken literally, it is bad law, and would not be followed by this Court (*Zartman vs. Bank*, 216 U. S., 134, 138). We think, however, that Mr. Justice VANN clearly meant that where the contract is absolutely void as against general creditors (either *malum in se* or *malum prohibitum*) the local requirement that a creditor seeking to attack it must first issue execution on a judgment will be dispensed with where the action is brought by a trustee in bankruptcy.

This view is greatly strengthened by the fact that Mr. Justice VANN was deciding a case in which the contract was absolutely void as against general creditors.

There can be no doubt whatever, that in the absence of fraud or statutory inhibition making the contract void as against general creditors, no rights

of general creditors intervene and none are represented by the trustee.

Judge NOYES in the Circuit Court of Appeals below, distinguishes the *Zartman* case as follows (*R.*, 1144):

“In that case there was merely a contract to give a mortgage upon after acquired property. There was no lien which could have been enlarged or perfected by taking possession.”

In re Great Western Mfg. Co., 152 Fed. Rep., 123, was a case where the bankrupt had purchased machinery and material for its mill, under the ordinary contract of conditional sale. This contract contained a clause that the notes of the vendee should “*be secured by first mortgage on said premises and appurtenances or equivalent security, at the first party's (the vendor's) election.*” A mortgage on the mill site and mill was given just prior to bankruptcy when the vendor had full knowledge of the vendee's hopeless insolvency. The vendor's title under the contract of conditional sale was held good against the trustee, but the mortgage was held to be a voidable preference.

The clause in this contract in the *Great Western* case was (to borrow Lowell's exact language, *supra*) “a general covenant for further security.” It was a promise to give further security by way of a first mortgage on real estate, *or equivalent security, when required at the creditor's election*, and so indefinite. The language here is almost identical with the language of the contracts in the cases cited by Lowell on Bankruptcy, Section 86, to which we have previously referred at some length. The agreement was in the future tense. Until the mortgage was given there was no present agreement for security on any specific property. The election to have further security was made just be-

fore bankruptcy (see also *Page vs. Rogers*, 211 U. S., 575, 579).

To say that the contract of June 30, 1903, and all the subsequent agreements under which about two hundred and fifty drafts were accepted by appellee, did not sufficiently indicate an intention to make the particular property which was placed in a separate package, marked and entered in the books as appellee's property, set aside in a vault where it remained, treated and accounted for at all times by the bankrupts as appellee's property, and finally surrendered to appellee without objection on demand, a security for appellee's obligation, is to violate the express provisions of a simple contract.

The three cases of *Casey vs. Cavaroc*, *Same vs. National Park Bank* and *Same vs. Schuchardt*, arose under the Civil Code of Louisiana. The law of Louisiana relating to the pledge or pawn of stocks, bonds and promissory notes is fixed by statute and is different from that of England and of every other State in the Union. These cases were decided by a divided Court. Mr. Justice SWAYNE, Mr. Justice FIELD and Mr. Justice HARLAN dissenting in each case.

Casey vs. Cavaroc was a suit in equity by the receiver of a national bank to recover possession of securities alleged to have been delivered by the bank to Cavaroc & Son, in contemplation of the insolvency of the bank, not by way of pledge, but with a view of giving a preference to Cavaroc & Son and the Credit Mobilier over other creditors of the bank, contrary to Section 52 of the Louisiana banking act.

The defendants by their answers denied the preference and insisted "that they were actually pledged to the society by virtue of a distinct agreement."

The agreement is set forth in correspondence between Cavaroc, president of the bank, and the Credit Mobilier, from which it appears that the Credit Mobilier entered into a profit and loss sharing arrangement with the bank, by which it was to accept drafts drawn on it by the bank, and the funds realized from the sale of these drafts were to be used in the purchase of securities which were to be deposited with Cavaroc & Son. The bank was to guarantee the investment, interest was to be carried to the credit of the joint account, and the profit and loss was to be divided equally between the Credit Mobilier and the bank.

There was no agreement for a pledge or lien of any kind on the securities. The only agreement was that the proceeds of the drafts should be used in the purchase of securities which should be deposited with Cavaroc & Son, and that profit and loss should be shared (see p. 469 of *Opinion*). This agreement was made during the summer before the bank failed but while it was insolvent and its insolvency suspected by many business men of New Orleans and its stock totally unsalable.

The securities were handed to Cavaroc and by him handed back to the cashier of the bank. They soon found their way into the hands of the discount clerk of the bank, where *they were used by the bank in the ordinary course of its business.* No entry was made on the books of the bank of the transaction.

"The pledge of the securities was not noticed. These all remained on the portfolio of bills discounted, as before, and their amount continued to be represented in the daily and monthly statements, without any note or memorandum to show that they had been pledged. So far as the public, and those with whom the bank dealt, could perceive, the bank continued to have possession

and control of all the securities in its own right, and they all appeared to be equally liable with the other assets to the claims of all the creditors."

The statute of Louisiana reads :

"That where a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations, or claims upon other persons, he shall deliver to the creditors the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights so pawned ; and such pawn so made, *without further formalities*, shall be valid as well against third persons as against the pledgors thereof, if made in good faith."

Louisiana is the only State in which a mere delivery of the certificate or note, without more, constitutes a valid pledge (see *Nisbit vs. Macon Bank*, 12 Fed. Rep., 686). Everywhere else some written transfer or contract is necessary for a pledge of stock to be good against third parties.

Article 3162 of the Louisiana Code reads :

"In no case does this privilege subsist in the pledge except when the thing pledged, if it be a corporeal movable, or the evidence of the debt, if it be a note or other obligation under private signature, has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties."

The question, therefore, was whether the scrip "had been actually put and remained in the possession of the creditor, or of a third person," so as to create a pledge under this statute.

These statutes and others are set forth in the opinion as the basis of the decision (*pp. 481 et seq.*).

It was held that inasmuch as these securities remained in the possession and control of the bank there was no pledge under the Louisiana law.

The Court then continued (p. 486) :

" It must not be overlooked that the Credit Mobilier has no other claim to the securities in question but that of pledge. A pledge, and possession, which is its essential ingredient, must be made out, or their privilege fails. An agreement for a pledge raises no privilege. There is no mortgage, for the title of the securities was never transferred to them. The evidence of the cashier is that they were all stamped payable to the order of the bank when discounted. They were not indorsed by the cashier until the day they were removed by Cavaroc, which was after the bank had failed."

Of course there was no other claim in that case but that of a pledge. Nothing else was pleaded or could have been successfully pleaded. There was no mortgage and no agreement for a lien on the securities. There was merely an agreement that they should be deposited, which was not done. If the agreement had been carried out and the deposit made there might have been a good pledge under the Louisiana law. It is perfectly manifest that the only question before the Court was whether the technical requirements of the peculiar statute of Louisiana had been complied with so as to create a pledge of paper securities. The Court held that these requirements had not been complied with, but such a decision has no application whatever to the case at bar. The agreement in *Casey vs. Cavaroc*, which was merely that certain securities should be deposited in a certain way, which was not done, was void by Louisiana statute as against general creditors and hence void against the receiver (p. 489). This is made even clearer at page 490, where the Court says :

" Where the legal or equitable property

in a security passes, and there is no express law invalidating the transfer, the creditor will be entitled to hold it as well against the assignee or receiver as against the debtor; * * * but in the present case that question does not arise; or, if it might be raised, it is immaterial. The Credit Mobilier claims a privilege by virtue of a pledge; and such a privilege, as we have seen, cannot be maintained as to third persons without possession."

Finally, at the very conclusion of the opinion, the Court says (*p. 491*):

"This suggestion (that equity will consider as done what the parties intended should be done) may also be answered by the fact that it cannot be truly said to have been the intent of the parties to transfer the title. *The agreement was only that 'securities of the first class shall be deposited with the firm of Messrs. Cavaroc & Son.'*"

Casey vs. National Park Bank, and *Casey vs. Schuchardt*, are decided on a narrower ground than *Casey vs. Cavaroc*. The agreement in the *National Park Bank* case would certainly amount to a declaration of trust under the law of New York and create an equitable lien on the securities, unless the doctrine of estoppel were invoked. The facts are essentially and vitally different from the facts in our case, as stated by the Court at *page 493*:

"The bills were never removed from the bank, and were never endorsed by it, until the bank failed; and were always kept on the portfolio of bills receivable, without any entry on or in the reports to show that they had been pledged. * * * There was no such possession by or on behalf of the Park Bank as would constitute a valid pledge as to third persons."

It will be noted that the only defense pleaded in this case was that of a valid pledge. We believe that the decision turned upon this question of pleading. This is shown by the Court's language in the *Schuchardt* case as follows (*p. 495*) :

"As the only claim made by Schuchardt & Sons, in their answer, to the securities in question is by way of pledge, and as there was no such delivery and retention of possession by them, or their agents or trustees, as the law requires, to constitute the privilege of a pledge as to third persons, their claim cannot be sustained."

It is certainly clear that all that was decided in these three cases was that what was done in each of them was not sufficient to constitute the privilege of a *pledge* as to third persons, under the peculiar provisions of the Louisiana Code. These cases are clearly and rightly distinguished by the Court below from the present case.

The very same Court, in a case reported in the same volume (*Gregory vs. Morris*, 96 U. S., 619), held that the legal effect of a contract for security on specific property is to create a charge upon the property, not in the nature of a pledge, but of a mortgage. This doctrine was reaffirmed in *Hau-sell vs. Harrison*, 105 U. S., 401.

We are not, in the case at bar, dealing with a promise to do something which was not done. It is not a promise to set aside securities. *The securities were actually set aside and remained earmarked and identified.* There was an express executory agreement that these particular securities, therein described and identified and set apart, should be security for defendant's obligation.

Ryttenberg vs. Schefer, 131 Fed. Rep., 313, cited by the Master in his opinion, is similar to *Casey vs. Cavaroc*, as we read the latter decision. *There*

was no agreement for a lien. Judge HOLT in his opinion, at page 322, states the precise point with great clearness:

"The defendants claim that, if there was no pledge at common law in this case, there was an equitable lien. Courts have undoubtedly gone far in some cases to uphold an equitable lien for the protection of parties who have made advances under agreements for liens. It is difficult to reconcile all the cases. But, in my opinion, under all the circumstances of this case, there is no adequate proof of an equitable lien. *In the first place, it must be borne in mind that there was no specific agreement for an equitable lien.* The agreement was simply that Radon & Co. should do their business through the defendants, and that all their goods, whether consigned or owned, should be consigned to the defendants as factors for sale upon commission. The entire claim of the defendants for a lien is based upon the assumption that they did act as factors, and that Radon & Co. did consign all the goods which they had to them, and that therefore they have the lien which the law gives a factor on the goods and accounts. * * * All the cases which have been called to my attention in which the facts are somewhat similar to those in this case, and in which an equitable lien has been upheld, are cases in which either there was a specific agreement for a mortgage or lien of some kind, or the goods, although remaining about the premises of the party giving the lien, were set apart in a lot or room leased to the party to whom the lien was to be given, and were delivered into the custody and control of an agent of the person to whom the lien was to be given.

The simple fact in this case is that Radon & Co. wanted to obtain advances without delivering possession of the property, and Schefer, Schramm & Vogel wanted to acquire a lien without taking possession of the prop-

erty. It was one of the numerous attempts to give a lien by owners of property while retaining the apparent ownership of it."

The agreement upon which the claim of lien which Judge HOLT is discussing was based was a single clause of a long written contract as follows:

"All goods at present consigned or owned by Radon & Co. shall be consigned by these respective owners to Schefer, Schramm & Vogel as factors for sale upon commission."

The goods in question were never consigned by Radon & Co. or any one else to Schefer, Schramm & Vogel, but remained in the open, notorious possession of Radon & Co. at the time of the bankruptcy of Radon & Co. There was no possessory lien and there was no "express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property * * * therein described or identified, a security for a debt or other obligation."

In *Casey vs. Cawroc*, *supra*, and *Rytlenberg vs. Schefer*, *supra*, the question under discussion is whether, in the absence of any agreement for a lien, what was done was sufficient to constitute a pledge. *In our case we are discussing the question whether an express executory agreement in writing, whereby the contracting party indicates a clear intention to make specific property, earmarked and set aside, a security for an obligation, creates an equitable lien in the property good as against the trustee in bankruptcy.* When the question is fairly stated, the answer seems too clear for argument.

The Master's statement that *Wood vs. U. S. Fid. & Guar. Company*, 143 Fed. Rep., 424-6 (which was one of a great number of cases, both State and Federal, cited on defendant's brief below in support of its contention that it had an equitable lien on

the securities) is overruled by the *In re Great Western Mfg. Co.* case, if inconsistent with that case, and that it is distinguishable from the case at bar in the nature of the language used, which was held to have created a lien as against the trustee in bankruptcy is erroneous.

In the *Wood* case, the bankrupt was a contractor in the employ of the United States Government, and agreed with the Surety Company which went on his bond, as follows :

" We do further agree in the event of our being unable to complete or carry on the aforesaid contract, to assign, and we do hereby assign, such plant as we may own or have upon said work, to the said United States Fidelity & Guaranty Company."

After the bankrupt was notoriously insolvent and had abandoned his contract, and just before bankruptcy, the Surety Company took possession of his plant and materials on the job, for the purpose of completing the contract.

The trustee in bankruptcy brought an action in the United States District Court in Massachusetts, to set aside the transfer as a voidable preference. *Held*, no preference. Judgment for defendant.

The Court said :

"The exercise by the defendants of the right to take it thus acquired, though within four months of the bankruptcy, and notwithstanding its knowledge, whether actual or imputed, that King was then insolvent, did not bring about a preference in its favor (see *Lowell on Bankruptcy*, Sec. 86, p. 67 ; *In re Jackson Iron Mfg. Co.*, Fed. cases, No. 7153). King's consent to the taking, or that of the common law assignees, in whom the title to all his property was then vested, so far as he could vest it in them, was, therefore, a consent to what they could

not lawfully oppose. The auditor finds that it was given in the belief that the defendant was lawfully entitled to the property, and that neither he nor they nor the defendant believed or had reasonable cause to believe that any preference was intended. According to the view of the matter above taken, these findings must be approved. There is nothing to show any fraudulent intent on the part of King or the defendant towards other creditors, so far as the taking is concerned, or to show any intent other than to carry into effect the right given by the indemnity agreement.

Assuming that it (the property) was all acquired by King after the execution of the indemnity agreement the defendant's claim to it when it was taken was, in my opinion, none the less valid. The defendant's right to the property is still as in *Thompson vs. Fairbanks*, 196 U. S., 517, and *Humphrey vs. Tatman*, 198 U. S., 91, to be judged not by the state of facts existing when possession was taken, but by the state of facts existing when the right was given. Since possession was taken before bankruptcy, the defendant, upon taking possession, held the property by a title relating back to the time when the right was acquired, at which time, so far as appears, there was nothing to prevent King from giving it such a right, and by a title which is good as against a trustee in bankruptcy."

The Master failed to see the clear distinction between the *Wood* case and our case, on the one hand, and *In re Great Western Mfg. Co.* case on the other. The former are both cases of valid equitable liens. The latter is a case of a promise to give a real estate mortgage, or equivalent security, at some future time, *when required*, which was neither given nor required until just before bankruptcy.

In the *Great Western* case the parties intended

future security, if required. In our case the parties intended present security on June 30, 1903. It is conceded that our contract was enforceable in equity *inter partes* as a contract for security before October 25th, 1907. *In re Great Western Mfg. Co.* is, like *Page vs. Rogers*, 211 U. S., 575, 579, a case where the parties did not intend present security until just before bankruptcy.

In our case the securities were actually set aside under the agreement of June 30, 1903, they were marked with appellee's name as its property, they were entered on the books of the bankrupt as defendant's property, the bankrupts periodically certified to appellee that

*"we have specially set aside and hold for your account * * * as security for the drawing credit which you accord us, the following securities."*

The securities were never removed from the vault when delivered to appellee in 1905 and 1906 and then inspected, checked up and returned. The quantity or value was never depleted and was always in excess of the amount of the drawing credit. The certificates of stock and notes were all properly endorsed at the time they were put into the package. Many of these endorsements were found dated several years back when the securities were examined during the trial. The securities were never used by Kessler & Co. of New York in their business or as a basis of credit. They were always treated as the property of appellee. They were duly entered in the bankrupts' books of account as securities against which money had been borrowed. They never appeared in any report or financial statement made by the bankrupts. None of the bankrupts' creditors knew of their existence, unless possibly some of the purchasers

of drafts who might have been informed that the drafts were secured by the deposit. The securities were kept in the custody of the bankrupts in precisely the same manner and on the same shelf as a large quantity of other securities belonging to customers and other people than the bankrupts. On the faith of this contract and what was done under it the appellees accorded to the bankrupts a drawing credit of £80,000, and during the four and one-half years preceding the bankruptcy accepted about two hundred and fifty drafts. During the ten weeks preceding October 25, 1907, appellee accepted drafts amounting to £80,000, the last of which was accepted by it on the very day it took possession. The proceeds of these drafts were used by the bankrupts in its business. These drafts the appellees have since been required to pay.

FURTHER REPLY TO APPELLANT'S BRIEF.

Appellant's present argument is this: that there was no legal pledge prior to possession taken of the scrip on October 25th, 1907; that prior to that time our contract was a nullity against creditors because (1) it was indefinite; (2) there was actual fraud, and (3) the contract was fraudulent in law.

It is conceded that the contract under which the securities were set aside was enforceable in equity, *inter partes*.

This being so, we fail to understand why it is necessary or profitable to characterize the contract. It was enforceable in equity, *inter partes*.—that sufficiently characterizes it as a contract which gave appellees rights over the property set aside which a court of equity will enforce, unless superior rights of general creditors have intervened.

We have attempted to show, under Point I, that the general property in the securities did pass when they were endorsed, put in the package, set

aside and earmarked as our property. Whether that general property passed by way of pledge or mortgage (the property being choses in action) has no bearing upon any question in this case.

The contract being enforceable in equity, *inter partes*, it remains for appellant to show why, how or in what respect the rights of general creditors have intervened, so that the Court will hold that possession taken under this contract was a voidable preference.

Appellant first says that possession so taken was such a preference because the contract was too indefinite. We have already argued the point in this brief at length. Appellant still relies upon *In re Great Western Mfg. Co.* and similar cases of purely executory agreements to give some kind of a lien in the future, if required. Appellant is misled by *Sheridan's* case, which, though briefly reported, was clearly a case of a promise to pledge certain property in the future, and therefore inconsistent with any agreement for present security.

Parshall vs. Eggert, 54 N. Y., 18, was a case where the parties intended present security by way of pledge, but failed to give possession to the pledgee, and JOHNSON, C., said:

"I know of no authority denying the right of a party who has a contract for a pledge, ineffectual for want of delivery, to obtain delivery at a subsequent time, and thus to validate the pledge."

See also *Godwin vs. Bank*, 145 N. C., 320, 329-30.

Appellant then argues under Point III of his brief, that there was actual fraud against creditors in the original transaction.

There is no finding of actual fraud by the District Court and both Judges writing for the Cir-

cuit Court of Appeals below, stated emphatically that the good faith of the parties could not be questioned. As Mr. Justice LURTON recently said in *Merillat vs. Hensey*, 221 U. S., 333, 341:

“In view therefore of the concurrence of both Courts in finding that no actual fraud was intended, we shall pass at once to the question of constructive fraud.”

See also *Page vs. Rogers*, 211 U. S., 575.

We come then to appellant's main contention, that there was constructive fraud. He rests this contention solely and exclusively upon the doctrine of *Edgell vs. Hart*, 9 N. Y., 213, which was reaffirmed in *Skilton vs. Codington*, 185 N. Y., 80, and *Zartman vs. First National Bank*, 189 N. Y., 237.

DENIO, J., thus stated the doctrine in *Edgell vs. Hart*, *supra*, at p. 217:

“The true question, then, is whether a person engaged in traffic and indebted can make a valid contract or conveyance in favor of one creditor, by which he shall possess a lien upon all the chattels which the debtor shall from time to time have on hand, allowing the latter to sell and purchase like an unqualified owner, the lien attaching only to what may be on hand at the time it is sought to be enforced.”

The rule has been strictly confined to mortgages covering their entire stock of merchandise employed by traders in their business.

For a full discussion of this New York doctrine with a review of the cases, see *Jones, Chattel Mortgages*, Fifth Edition, § 401 *et seq.*

While this Court has stated that it will follow the settled law of each State, it has intimated that

it would not follow this rule if it were an open question, and *Jones, Chattel Mortgages, supra*, at page 624, points out that the rule is not supported by any preponderance of authority, that it is contrary to sound policy and that the qualifications made by leading Courts have in a large measure destroyed its force.

We mention this, merely because appellant now asks, not for an application of this rule, but for an *extension* of it to contracts for security upon choses in action. He asks this Court to *infer* that because there is such a rule applicable to such chattel mortgages, the rule as to assignments of choses in action must be similar.

"In New York the question of fraud in chattel mortgages is materially affected by statute; for although a mortgage be duly filed, it is presumptively fraudulent and void if the mortgagor remain in possession" (citing cases).

Jones, Chattel Mortgages, supra,
§ 401.

We have referred to the New York Statutes on page 25 of this brief, and shown that these statutes do not relate to choses in action.

The New York law as to assignments of choses in action, both legal and equitable, may be found in

Niles vs. Mathusa, 162 N. Y., 546;
McNeeley vs. Welz, 166 N. Y., 124;
Central Trust Co. vs. West India
Imp. Co., 169 N. Y., 314.

Niles vs. Mathusa is decisive against appellant upon every point, except the point of indefiniteness, which he has argued in his brief.

The debtor assigned a liquor tax certificate as security for a loan. A judgment creditor, with an

unsatisfied execution, attacked the security, claiming (1) that it was a chattel mortgage and void against general creditors because not filed, and (2) that the assignee was estopped because he permitted the certificate to remain in the hands of the assignor, thus clothing him with apparent ownership.

We respectfully refer to the opinion of BARTLETT, J., concurred in by all the Judges sitting, as disposing of appellant's contentions contained at great length in his brief, that appellees were estopped for the same reason, that the contract was fraudulent in fact and fraudulent in law, that rights of creditors have intervened, and particularly of the unsupported assertion that the doctrine of *Edgell vs. Hart*, *supra*, reaffirmed in the *Skilton* and *Zartman* cases, can have any application to a legal or equitable assignment of choses in action as security.

McNeeley vs. Welz, *supra*, holds that an equitable assignee of a chose in action, has a title superior to a judgment-creditor who has attempted to levy in execution, such property not being subject to such levy.

In *Central Trust Co. vs. West India Co.*, *supra*, CULLEN, J., said :

"It is further the well-settled law of this State, though a different rule prevails not only in England, but in the Federal Courts and in some of the States, that a *bona fide* purchaser for value of a chose in action takes it subject not only to the equities between the parties, but also to latent equities in favor of third persons, and that to secure his superiority it is not necessary that the earlier assignee should give any notice of his assignment to the debtor or trustee."

If, as these cases clearly hold, a general creditor has no standing whatever to question an assign-

ment as security, legal or equitable, secret or otherwise, of a chose in action, how can appellant be heard to argue that there was actual or constructive fraud upon general creditors, arising out of apparent ownership of these securities by the debtor?

It will be noticed that neither the Master, the learned District Judge, nor the Circuit Court of Appeals gave serious consideration below to appellant's contention that our contract was void against general creditors under the chattel mortgage cases like *Edgell vs. Hart*, *supra*.

The Master and the learned District Judge regarded possession taken under the contract as a voidable preference, because they construed the contract to be merely an indefinite promise to give a pledge or mortgage in the future, or when required (*In re Great Western Mfg. Co.*, *supra*), instead of a present contract for security upon property specified, set aside and earmarked.

They apparently regarded the right given to substitute, as in some manner postponing the lien. The parties themselves regarded the transaction as complete, and believed that they had created and intended to create present security upon specified property. The Circuit Court of Appeals, following the New York decisions, has given effect to the intention of the parties (*National Bank of Deposit vs. Rogers*, *supra*). The rights of general creditors did not intervene (*American Sugar Refining Co. vs. Fancher*, *supra*; *Niles vs. Mathusa*, *supra*). In the *Skilton* case and the *Zartman* case, both instances of chattel mortgages covering the entire stock of a merchant, with an agreement permitting him to sport with the property until default, the rights of creditors did intervene in equity, because as to general creditors the mortgages were fraudulent in law.

VI.

There was no reasonable cause for appellees to believe that a preference was intended by the delivery of the securities on October 25th, 1907.

It cannot be that when Alfred Kessler, on October 25, 1907, surrendered these securities on demand to Henry Kessler, with the remark: "All right. They are yours. Do what you like" (*Master's 9th Finding, R., 1015*), he intended to prefer Kessler & Co., Limited, Manchester. He merely intended to carry out the agreement which the Manchester corporation on its part had fully performed. Nor can it be that the Manchester corporation, in demanding and taking what was theirs under their contract, had reasonable cause to believe that a preference was thereby intended, or that anything was intended except to do what was right and proper under the contract. The solvency or insolvency of the New York copartnership was no business or concern of theirs. It was merely acting in recognition of its rights under the agreement. It was not then guilty of securing a voidable preference (see *Humphrey vs. Tutman, 198 U. S., 91*; *Thompson vs. Fairbanks, 196 U. S., 516*).

Judge NOYES, writing for the Circuit Court of Appeals below, indicates the serious difficulty in holding such a transaction, in any view of the case, to be a voidable preference (*R., 1144*).

Moreover, we have contended throughout this litigation, and still insist, that as a matter of law, the proof of insolvency offered by appellant did not meet the clear requirements in such cases.

The foundation proof of insolvency on October 25th, 1911, offered by appellant was (1) the bankrupt copartnership schedules ; (2) the adjudication in bankruptcy.

The other evidence referred to in the opinion of the Master, notably the correspondence between Alfred Kessler and his brother, P. W. Kessler, and the correspondence between Alfred Kessler and his partner, Flinsch, was material and competent only as showing a certain amount of knowledge of the firm's condition possessed by those parties, but not as showing that condition to be insolvent.

The bankrupt's copartnership schedules were insufficient proof of insolvency, because the individual schedules of the partners were not offered.

Tumlin vs. Bryan, 165 Fed. Rep., 166 [Cited and approved in *In re Pearlhefter*, 177 Fed. Rep., 299, 305; *Worrell vs. Whitney*, 179 Fed. Rep., 1014; *Francis vs. McNeal*, 186 Fed. Rep., 481; *Crancer & Co. vs. Wade*, 25 Am. B. R., 880 (Supreme Court of Oklahoma, 1910)].

We quote the following from the opinion of the Circuit Court of Appeals for the Fifth Circuit in the *Tumlin* case :

“As each member of the partnership is liable individually for the partnership debts, it seems to follow that, to show such insolvency as to entitle the trustee to recover, the insolvency of the members of the firm should be proved. If a condition exists whereby all diligent creditors may obtain payment in full, it seems useless and unjust to sustain a suit against a defendant who has only collected what was due to him. It is true that a partnership may be treated as

an entity, separate from its individual members, for the purpose of its adjudication as a bankrupt (Bankruptcy Act, Sec. 5a; *in re Meyer et al.*, 98 Fed., 976, 39 C. C. A., 368; *In re Mercur*, 122 Fed., 384, 58 C. C. A., 472); but, in a suit to recover a preference, it is not only the insolvency of an intangible entity, but the insolvency of its responsible component parts that lies at the foundation of the right to relief. If the component parts of the firm may be made to pay the firm's debts, the suit lacks reason and substance, and it cannot be held that the defendant has obtained a greater percentage of his debt than other creditors of the same class. If the members of the firm are solvent, all creditors may be paid in full. If the individual members of the partnership are not shown to be insolvent at the date of the payments, the preference is not voidable (*Vaccaro et al. vs. Security Bank of Memphis et al.*, 103 Fed., 436, 43 C. C. A., 279. See also *In re Blair et al.* (D. C.), 99 Fed., 76; *Davis et al. vs. Stevens et al.* (D. C.), 104 Fed., 235; *In re Forbes et al.* (D. C.), 128 Fed., 137; *In re Perley & Hays* (D. C.), 138 Fed., 927.)"

One of the partners, Gillette, was believed by Alfred Kessler to be worth \$2,000,000 (*R.*, 108) and reputed to have transferred \$800,000 to his wife (*R.*, 534).

The adjudication in bankruptcy was no proof of insolvency, because the only act of bankruptcy alleged in the petition was the making of a general assignment for the benefit of creditors, on October 30th, 1907.

West Company vs. Lea, 174 U. S., 590.

The petition in bankruptcy was not filed until November 8th, 1907.

The books of the firm showed it to be solvent on October 25, 1907, by a margin of \$500,000 (*Defts'. Exs MM, R, 979*).

There is no evidence that the assets of the co-partnership as an entity were at a fair valuation on October 25th, 1907, exceeded by the liabilities.

Insolvency as a necessary element of appellant's proof in this suit should not be predicated against the appellees upon inference or upon excited arguments drawn from various letters written by persons describing a New York panic.

Prior to October 25, 1907, the firm of Kessler & Company of New York had never defaulted in a payment nor given the slightest outward sign of weak financial conditions. *All its liabilities up to October 28, 1907, were met as they matured (R., 668)*. It was one of the oldest and generally regarded as one of the strongest banking houses of Wall street. The ordinary man, knowing the facts that P. W. Kessler and Henry Kessler knew on that day would not have believed them insolvent within the definition of the Bankrupt Act. They might have feared that the New York house would be unable to meet its drafts coming due, and that Manchester would have to take care of them. They might have been apprehensive in this sense. Even a mere suspicion of the insolvency of Kessler & Company was not reasonable cause to believe that Kessler & Company were insolvent on the 25th of October (*Harmon vs. Walker, 131 Mich., 540; Stucky vs. Bank, 108 U. S., 74; Grant vs. Bank, 97 U. S., 80; Off vs. Hakes, 142 Fed Rep., 364 (C. C. A., 7th Cir.); Suffel vs. The Bank, 127 Wis., 208; in re Pettingill, 135 Fed. Rep., 218, 220; in re Eggert, 102 Fed. Rep., 735 (C. C. A., 7th Cir)*). And how could either P. W. Kessler or Henry Kessler have discovered that Kessler & Company were insolvent if this had been so? The

books did not show it (*Defendants' Ex. MM., R., 979*). Alfred Kessler did not admit it (*R., 248*), and did not know it, if it was the fact (*R., 248*). No one believed it. *It was not the fact.* Insolvency on November 8th, 1907, or even October 30th of that year, is not proof of insolvency on the 25th of October preceding. Indeed, if it had been shown that Kessler & Company were insolvent on the 26th of October, or the afternoon of the 25th of October, it would not follow that they were insolvent when physical possession of the collateral was taken by Kessler & Company, Limited, on the morning of that day because of the rapid decline in the security market at that time (*Upson vs. Mount Morris Bank, 103 App. Div., N. Y., 367*).

There was some proof of the value of securities held by the firm, and we offered proof of the value of the "escrow," but all of this proof, besides being wholly inadequate to establish insolvency, was based upon changed values caused by the failure on October 30th, 1907, of the firm itself (*R., 865, 866*). Most of these securities were participations in syndicates of which the New York firm was the manager, and naturally the failure of that firm greatly diminished their value.

The Manchester corporation accepted a draft for £5,000 drawn by the New York copartnership on the very day, October 25, 1907, when the scrip was taken over (*Defendants' Ex. DD., R., 955*). The fact that the Manchester house went on accepting drafts right up to the time of the failure, and actually increased the drawing credit by £20,000 on August 27, 1907, is utterly inconsistent with a belief by the Manchester corporation that the New York firm was insolvent or that a preference was intended.

We assume that the Court will not disturb the findings of the Courts below as to any *primary facts*

(*Merillat vs. Hensey*, 221 U. S., 333). The *primary* facts in this case are not disputed, but the *inferences* and *deductions* therefrom as to insolvency as a necessary element to entitle complainant to recover in this suit, and reasonable cause to believe a preference was intended should be closely scrutinized by this Court and, if such deductions are not warranted there is another reason why the decree of the Circuit Court of Appeals should be affirmed.

VII.

The decree of the Circuit Court of Appeals should be affirmed and the complaint dismissed upon the merits.

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December, 1911.



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SEXTON, TRUSTEE IN BANKRUPTCY OF KESSLER & COMPANY, v. KESSLER & COMPANY, LIMITED.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 92. Argued December 12, 13, 1911.—Decided May 27, 1912.

The conduct of business men acting without lawyers and in good faith, attempting to create a personal security for an actual debt, should be fairly construed as actually effecting what the parties meant; and so held, in this case, that an escrow of securities made by a banking firm in New York to secure its drafts upon a foreign bank amounted to a lien on the securities to be preferred to the claim of the trustee in bankruptcy, notwithstanding that the New York firm retained physical power over the securities, as agent for the foreign house, and had the right to substitute other securities for those withdrawn and sold.

Under the decisions of this court, and the courts of New York, a customer has such an interest in securities carried for him by a broker that a delivery to him after the insolvency of the broker is not necessarily a preference under the bankruptcy law. *Richardson v. Shaw*, 209 U. S. 365.

172 Fed. Rep. 535; 97 C. C. A. 161, affirmed

THE facts, which involve the question of whether under the Bankruptcy Act of 1898, certain transfers of securities by the bankrupt constituted a fraudulent preference, are stated in the opinion.

Mr. John Larkin, with whom *Mr. Alexander S. Andrews*, was on the brief, for appellant:

There was no valid legal pledge to the defendants because possession was not given until October 25, 1907. *Casey v. Caveroc*, 96 U. S. 467; *Wilson v. Little*, 2 N. Y. 443; *Buffalo German Ins. Co. v. Third National Bank*, 162 N. Y. 170; *Security Warehousing Co. v. Hand*, 206 U. S. 415.

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Possession is of the essence of a pledge; without it no privilege can exist as against third persons. *Casey v. Caveroc*, 96 U. S. 467; *Casey v. Natl. Park Bank*, 96 U. S. 492; *Casey v. Schuhardt*, 96 U. S. 494.

The legal pledge having failed, it cannot be supported either as an equitable pledge, an equitable mortgage or a declaration of trust. There was no equitable pledge. *In re Great Western Mfg. Co.*, 18 Am. B. R. 259; *Page v. Rogers*, 211 U. S. 575; *Wilson v. Nelson*, 183 U. S. 191; *Security Warehousing Co. v. Hand*, 206 U. S. 415; *Fourth Street Bank v. Millburne*, 172 Fed. Rep. 177; *Re Sheridan*, 98 Fed. Rep. 406; *Copeland v. Barnes*, 147 Massachusetts, 388; *Bank of Leavenworth v. Hunt*, 11 Wall. 394; *Griswold v. Sheldon*, 4 Comst. 581; *Wood v. Lowry*, 17 Wendell, 492.

A court of equity will not uphold, on the theory of equitable lien, an attempted pledge which fails at law, when the rights of creditors are involved. *Casey v. Caveroc*, 96 U. S. 467; *Security Warehousing Co. v. Hand*, 206 U. S. 415; *Wilson v. Little*, 2 N. Y. 446; *Buffalo G. I. Co. v. Third Natl. Bank*, 162 N. Y. 163; *Ryttenberg v. Schefer*, 11 Am. Bk. Rep. 664; *Nisbit v. Macon Bank*, 12 Fed. Rep. 686; *Fourth St. Natl. Bank v. Milburne Mills Co.*, 172 Fed. Rep. 177; *Zartman v. Bank*, 189 N. Y. 267.

What the courts have defined as "the inexorable rule of law" is that possession of the pledge must be in the pledgee. *Van Zile's Bailments and Carriers*, § 237a; *Skelton v. Codrington*, 185 N. Y. 88; *Frank v. Volkommer*, 205 U. S. 529.

There is no such thing as an equitable pledge; one either has made a pledge or he has not. Support for the existence of such a contradiction as "equitable pledge" must be found, if at all, in the fact that equity in some circumstances will consider as done what was agreed to be done. But that doctrine has no application where bankruptcy intervenes.

The bankrupts never agreed to give nor did Manchester stipulate to receive, possession (except after financial embarrassment had intervened)—and hence there was no contract, relative to possession, for equity to enforce by deeming it performed.

There was no equitable mortgage, as held by a majority of the Court of Appeals.

The parties did not intend to create a mortgage, but only a pledge with peculiar features, viz., possession to remain in the pledgor with absolute power of disposal.

In New York, as elsewhere, a mortgage of personal property is a transfer of title subject to be divested on condition subsequent, viz., by payment of the debt. The parties intended no such thing.

The intention of the parties is shown by their correspondence.

Even if the parties had intended to make a mortgage it would have been invalid in so far as it purported to cover after-acquired property; and *in toto* because of provisions in it, and in the method of carrying it out, that made it fraudulent in law and absolutely void as to creditors. *The Zartman Case*, 189 N. Y. 271.

The word "escrow" has usually to do with the passing of title, but it has to do with the passing of title only upon delivery, and prior to the delivery of the escrow the rights of the parties as to title remain exactly as before the escrow was created.

The Chattel Mortgage Act of New York (Lien Law, § 90) provides that all mortgages of "goods and chattels" shall be absolutely void unless there is an actual and continued change of possession, or the mortgage is filed.

Stackhouse v. Holden, 66 App. Div. 433; *Risley v. Phenix Bank*, 83 N. Y. 318; *Hudson River Bank v. Chaskin*, 28 App. Div. 311, can all be distinguished.

The learned judge was in error in stating that there was no fraud in the transaction here, and that, as no rights

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of purchasers or attaching creditors intervene, the taking possession by the Manchester house was entirely legal and proper; such is not the law of New York. *Parshall v. Eggert*, 54 N. Y. 18; *Skilton v. Coddington*, 185 N. Y. 86; *Sabin v. Camp*, 98 Fed. Rep. 97, are not authority as a declaration of the laws of the State of New York.

There was no declaration of trust.

Whether there was a declaration of trust, and a consequent transfer of the title, is just as much a question of local law as the other questions, namely, those of pledge and equitable mortgage. As to the law of New York, on this subject, see *Martin v. Funk*, 75 N. Y. 137; *Matter of Totten*, 179 N. Y. 112; *Young v. Young*, 80 N. Y. 422; *Barry v. Lambert*, 98 N. Y. 300; *Matter of Bolin*, 136 N. Y. 177; *Locke v. Farmers' L. & T. Co.*, 140 N. Y. 135.

Unless, therefore, Kessler & Co. of New York by their letters, certificates and acts intended to divest themselves of all beneficial interest in the securities and to hold the whole interest therein for the benefit of Kessler & Co. of Manchester, the transaction cannot be sustained as a declaration of trust.

If a pledge, imperfect or invalid because of want of delivery of the pledged property, can be sustained as a declaration of trust, the result will practically be to abolish technical pledges, "whose very essence" is the possession of the pledged property by the pledgee. *Young v. Young*, 80 N. Y. 422.

The cases where equity has given relief in insolvency cases are generally where the claimant's money has produced the very thing sought to be subjected to the lien. *National Bank v. Rogers*, 166 N. Y. 380; *Hauselt v. Harrison*, 105 U. S. 401; *Hurley v. Atcheson & Co. R. R.*, 213 U. S. 126.

The transaction between Kessler & Co. of New York and Kessler & Co. of Manchester was inequitable and in

bad faith and deceived existing as well as prospective creditors.

The law is in favor of the appellant without respect to the appellee's good or bad faith. *Robinson v. Elliott*, 22 Wall. 525.

The New York house held themselves out to all the world as the owners of the securities, as the arrangement expressly authorized. The result was a credit with various bankers and customers, fictitious in fact and fraudulent in law.

This case is not one of fraud based upon express misrepresentation, and it is not necessary for the trustee in bankruptcy to show that the defendants made express representations false in fact. But the case is full of evidence to show that with the knowledge and consent of the Manchester house the New York house represented itself as the owner of the securities over which the Manchester house claimed a secret lien. *Martin v. Mathiot*, 14 Serg. & R. 214.

The agreement between the parties was fraudulent as a matter of law irrespective of good or bad faith, and was void as against creditors.

Clauses permitting the debtor to use the securities as his own make the agreement fraudulent in law and void *ab initio* as to creditors; and if the debtor and creditor act in such a way that the debtor uses the property as his own, the result is the same. *Zartman v. Bank*, 189 N. Y. 267, 273; *Skilton v. Codrington*, 185 N. Y. 80; *Bowditch v. Page*, 153 N. Y. 104; *Scherl v. Flam*, 129 App. Div. 561; *Hangen v. Hachemeister*, 114 N. Y. 566; *Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 N. Y. 168; *Russell v. Winne*, 37 N. Y. 591; *Mandeville v. Avery*, 124 N. Y. 376; *Wood v. Lowry*, 17 Wend. 492; *Chatham Bank v. O'Brien*, 6 Hun, 231; *Griswold v. Sheldon*, 4 N. Y. 584; *Gardner v. McEwen*, 19 N. Y. 123; *Brackett v. Harvey*, 91 N. Y. 214; *Bainbridge v. Richmond*, 47 Hun, 391.

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When an agreement for security or protection is thus fraudulent in law and void, it may be attacked by any creditor, whether having a judgment or not, if it is impracticable or useless to obtain a judgment. *Skilton v. Codington*, 185 N. Y. 80, 86, 89; *Russell v. St. Mart*, 180 N. Y. 355, 359, 360; *Karst v. Gane*, 136 N. Y. 316, 323; *Stephens v. Perrine*, 143 N. Y. 476; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545.

Mr. Abram I. Elkus and *Mr. F. C. McLaughlin*, with whom *Mr. Rufus W. Sprague, Jr.* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by a trustee in bankruptcy to set aside an alleged fraudulent preference. The Circuit Court of Appeals reversed a decree of the District Court for the plaintiffs and dismissed the bill. 172 Fed. Rep. 535. 97 C. C. A. 161. It will be enough for our decision to state the following facts: The appellee was an English company and the bankrupts a New York firm intimately connected with it which for many years had drawn upon it. In February, 1903, the English house requested the New York firm to set aside securities for their drawing credit. The New York firm wrote on June 30 that they had that day placed in a separate package in their safe deposit vaults certain securities named, the package being marked 'Escrow for account of Kessler & Co., Limited, Manchester;' adding 'This escrow is intended as a protection against our long drawings against your good selves.' This letter was acknowledged and it was added "If at any time you have the opportunity of realizing these securities or any part of them, you are at liberty to take them and to replace them by others of equal value, though in that case we should of course like to see rather better quality." In

December of the same year the English house suggested a form of certificate as follows: "We certify that we have specially set aside and hold for your account, on this, the 31st day of December, '03, as security for the drawing credit which you accord us, the following securities. Name secs. and market value." This was conformed to and the New York house also entered the securities and all substitutions on their loan book. Substitutions were made from time to time and the English house notified. The securities always were either negotiable by delivery or indorsed in blank. They were marked and kept as stated in the letter upon a separate shelf of the New York firm's vault, and they never were removed except in 1905 and 1906 when they were taken to the office to be examined and checked off by representatives of the English company. Business went on in this way until the panic of 1907. On October 25 of that year, the stability of the New York firm being in doubt, it handed over the escrow securities to an agent of the English company then in New York and he deposited them in a safe deposit vault in the name of the company. On November 8 a petition of bankruptcy was filed and on November 27 the New York firm was adjudged bankrupt. Notwithstanding arguments to the contrary it may be assumed that the arrangement between the parties was made in good faith and intended and believed to be valid, and on the other hand that at the time of the change of custody on October 25, within four months of the petition, the New York firm was insolvent and that the English company had reasonable cause to believe that a preference was intended if its rights began only on that date.

So far as the interpretation of the transaction is concerned it seems to us that there is only one fair way to deal with it. The parties were business men acting without lawyers and in good faith attempting to create a present security out of specified bonds and stocks. Their

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conduct should be construed as adopting whatever method consistent with the facts and with the rights reserved is most fitted to accomplish the result. If an express declaration of an equitable lien, or again a statement that the New York firm constituted itself the servant of the English company to maintain possession for the latter, or that it held upon certain trusts, or that a mortgage was intended, or any other form of words, would effect what the parties meant, we may assume that it was within the import of what was done, written and said. So the question is whether anything in the situation of fact or the rights reserved prevents the intended creation of a right *in rem*, or at least one that is to be preferred to the claim of the trustee.

The bankruptcy law by itself does not avoid the transaction. *Thompson v. Fairbanks*, 196 U. S. 516. *Humphrey v. Tatman*, 198 U. S. 91, 95. A trustee in bankruptcy does not stand like an attaching creditor; he gets no lien by the mere fact of his appointment. *York Manufacturing Co. v. Cassell*, 201 U. S. 344. *Zartman v. First National Bank of Waterloo*, 216 U. S. 134, 138. The most obvious objection is that the continued physical power of the New York firm over the securities and its right to withdraw and substitute admittedly reserved are inconsistent with a title or lien of the English house in any form. But the decisions of this court and of New York agree that there may be title in a stronger case than this. When a broker agrees to carry stock for a customer he may buy stocks to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand or that he buys when the time for delivery comes. Yet as he is bound to keep stock enough to satisfy his contracts, as the New York

firm in this case was bound to substitute other security if it withdrew any, the customer is held to have such an interest that a delivery to him by an insolvent broker is not a preference. *Richardson v. Shaw*, 209 U. S. 365. *Markham v. Jaudon*, 41 N. Y. 235. So a depositor in a grain elevator may have a property in grain in a certain elevator although the keeper is at liberty to mix his own or other grain with the deposit and empty and refill the receptacle twenty times before making good his receipt to the depositor concerned.

Whether enough has been done to give a right of any kind in certain property is a question of more or less. See *Union Trust Co. v. Wilson*, 198 U. S. 530, 537. In the case of ordinary goods and chattels, where, for instance, a man mortgages his stock in trade as it may be from time to time, retaining possession and full power to sell and replace or not as he sees fit, it well may happen that the security fails. *Skilton v. Codington*, 185 N. Y. 80. *Zartman v. First National Bank of Waterloo*, 189 N. Y. 267. So a general promise to give security in the future is not enough. But the present was a more limited and cautious dealing. It was confined to specific identified stocks and bonds on hand, and purported to give an absolute present right, qualified only by possible substitution and perhaps by a right of partial withdrawal if the remaining securities had risen sufficiently in value. It purported not to promise but to transfer; and the subject-matter was not goods and chattels in the sense of the New York mortgage law as we understand that law to be interpreted by the New York courts. The transaction was not void as against creditors irrespective of attachment, as in *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545. *Niles v. Mathusa*, 162 N. Y. 546. There can be no doubt, as was said by the court below, that before the bankruptcy the English house had an equitable right at least to possession if it wanted it. While the phrase equitable lien

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Counsel for Parties.

may not carry the reasoning further or do much more than express the opinion of the court that the facts give a priority to the party said to have it, we are of opinion that the agreement created such a lien at least, or in other words, that there is no rule of local or general law that takes from the transaction the effect it was intended to produce. *Hurley v. Atchison, Topeka & Santa Fe Ry. Co.*, 213 U. S. 126, 134. When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York and in the absence of any controlling statute to the contrary such we understand to be what the law should be. *Parshall v. Eggert*, 54 N. Y. 18. *National Bank of Deposit v. Rogers*, 166 N. Y. 380.

Decree affirmed.